Supreme Court, U.S.
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No. 00-281

In The

Supreme Court of the United States

JOANN PATENAUDE, et al.,

Petitioners,

v.

OWENS ILLINOIS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 28 U.S.C. § 1407(a) requires the Judicial Panel on Multidistrict Litigation to remand individual asbestos cases transferred to MDL 875 when the only activity taking place in those cases is individual settlement discussions and the transferee court is therefore not conducting "coordinated or consolidated pretrial proceedings" with respect to those claims?

PARTIES TO THE PROCEEDING

The Petitioners in this case are listed at App. 77. Respondents are Owens-Illinois, Inc., Pittsburgh Corning Corp., Armstrong World Industries, Inc., Asbestos Claims Management Corp., Flexitallic Inc., GAF Corp., Pfizer, Inc., T&N PLC, and United States Gypsum Co.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. Background of MDL 875	3
C. The Transferee Court's Efforts to Coordinate Global Negotiations Have Failed	6
D. Current Discovery and Settlement Activities in MDL 875 Are Entirely Plaintiff-Specific	7
E. Procedural History	9
1. The New York Petitioners	9
2. The Georgia Petitioners	12
3. The Oregon Petitioners	13
4. The Mandamus Proceeding	14
REASONS FOR GRANTING THE WRIT	15
I. The Court of Appeals' Decision "Conclusively Thwarts" the Panel on Multidistrict Litigation's Statutory Obligation to Remand Cases under 28 U.S.C. § 1407(a)	15

TABLE OF CONTENTS – Continued

Page

II. Certiorari Provides the Only Means by which Petitioners Can Gain Access to the Courts 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) ...6, 7

In re Asbestos and Asbestos Insulation Material Prod. Liab. Litig., 431 F. Supp. 906 (J.P.M.L. 1977) 3

In re Asbestos Prod. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) 4, 5

In re Asbestos Sch. Prod. Liab. Litig., 606 F. Supp. 713 (J.P.M.L. 1985) 4

Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) 4

Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973)..... 19

Kerr v. United States District Court, 426 U.S. 394 (1976) 22

Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 523 U.S. 26 (1998).....3, 15, 16, 17, 22

Silveyra v. Moschorak, 989 F.2d 1012 (9th Cir. 1993) 21

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)..... 21

Statutes

28 U.S.C. § 1254..... 1

28 U.S.C. § 1404..... 16

28 U.S.C. § 1407(a) 1, 14, 15, 16, 18, 22

28 U.S.C. § 1407(e) 22

28 U.S.C. § 1651..... 1

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

17 JAMES W. MOORE *ET AL.*, MOORES FEDERAL PRACTICE, § 112.04[1][b] (3d ed. 1999) 19

Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Public Policy 541 (1992) 5

OPINIONS BELOW

The opinion of the court of appeals denying petition for writ of mandamus (App. 1-23) is reported at 210 F.3d 135. The Panel on Mulitidistrict Litigation's orders denying Petitioners' motions to remand (App. 48; 58) are unreported.

JURISDICTION

The judgment of the court of appeals (App. 24) was entered on April 11, 2000, and a timely petition for rehearing was denied on May 24, 2000. App. 25-26. This Court has jurisdiction under 28 U.S.C. § 1254, or, alternatively, 28 U.S.C. § 1651.

STATUTE INVOLVED

28 U.S.C. § 1407(a):

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings

> to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

STATEMENT OF THE CASE

A. Introduction

The time has finally come to write the last chapter in the Dickensian saga of MDL 875. Nearly eight years have passed since the Judicial Panel on Multidistrict Litigation transferred all pending federal asbestos personal injury damages cases to judge Charles Weiner in the Eastern District of Pennsylvania. But the MDL story the Panel set out to write in 1991 – with its utopian vision of global resolution of asbestos cases – has not and will not come to pass. Instead, MDL 875 has created interminable delays for thousands of plaintiffs whose cases have been transferred. A consolidation that began as an effort to streamline the resolution of asbestos cases has instead prevented the vast majority of those cases from reaching trial, even when discovery has been completed and settlement efforts have been exhausted. A transferee court that was envisioned as a venue for *global* negotiations to resolve *all* asbestos claims has been transformed into a clearinghouse for *individual* negotiations to resolve small groups of cases. An enabling statute that was designed as a means to permit courts to conduct "consolidated or coordinated pretrial proceedings" with respect to *common*

issues of law or fact has devolved in the asbestos context into a mechanism for resolving *individual* issues, conducting *individual* discovery, and imposing *individual* settlements on plaintiffs who have no leverage to negotiate. A transferee court charged with the limited, *procedural* authority to coordinate common discovery has instead chosen to undertake the *substantive* task of preserving the assets available to satisfy asbestos claims. And the court of appeals charged with enforcing the Judicial Panel on Multidistrict Litigation's statutory obligation to remand cases from MDL 875 has willfully ignored this Court's clear direction regarding the MDL statute – that the phrase "coordinated or consolidated pretrial proceedings" may not be interpreted so broadly as to "conclusively thwart" the Panel's remand obligation. *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26, 36 (1998).

B. Background of MDL 875

The asbestos multidistrict litigation was created "to provide a means for centralized judicial management of common aspects of the constituent actions, while still preserving elements of localized judicial management." App. 31 (1991 Order to Show Cause). But identifying the existence of any "common aspects" among all asbestos cases was problematic, to say the least. Indeed, by 1987, the Judicial Panel on Multidistrict Litigation had declined to transfer the federal asbestos cases to a single district on five separate occasions, citing the fact that "[m]any factual questions unique to each action or a group of actions already pending in a single district clearly predominate, and therefore transfer is unwarranted." *In re Asbestos and*

Asbestos Insulation Material Prod. Liab. Litig., 431 F. Supp. 906, 910 (J.P.M.L. 1977); *see also In re Asbestos Prod. Liab. Litig. (No. II)*, MDL-416 (J.P.M.L. March 13, 1980) (unpublished order); *In re Asbestos Sch. Prod. Liab. Litig.*, 606 F. Supp. 713 (J.P.M.L. 1985); *In re Ship Asbestos Prod. Liab. Litig.*, MDL-676 (J.P.M.L. Feb. 4, 1986) (unpublished order); and *In re Leon Blair Asbestos Prod. Liab. Litig.*, MDL-702 (J.P.M.L. Feb. 6, 1987) (unpublished order).

By 1991, although the predominance of unique, plaintiff-specific issues remained characteristic of asbestos litigation, the political pressure to resolve the cases through some type of aggregate mechanism had heightened considerably. In November 1990, eight federal district judges from around the country, including Judge Weiner, sent a letter to the Panel requesting that it transfer all asbestos personal injury cases pending throughout the country to Judge Weiner as transferee judge. App. 27 (letter); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 265 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In their letter, the judges advised the Panel that transfer "will facilitate global settlements," and "will permit us to fully explore other national disposition techniques such as classes and sub-classes under Rule 23." *Id.* Meanwhile, Chief Justice William Rehnquist had appointed a number of federal trial and appellate judges to an ad hoc committee of the U.S. Judicial Conference to study asbestos litigation. In March 1991, the "Rehnquist Committee" issued a detailed report in which it urged Congress to create a statutory mechanism for resolving the cases. *See In re Asbestos Prod. Liab. Litig. (No. VI)*, 771 F. Supp. at 418-420 (J.P.M.L. 1991).

In light of these outside pressures to do *something* about asbestos litigation, the Panel's decision to create MDL 875 came as no surprise. Notwithstanding its repeated earlier reluctance to aggregate the asbestos cases, and while explicitly acknowledging the continued existence of significant differences among individual asbestos cases, *see* App. 30 (Order to Show Cause), in 1991 the Panel nonetheless determined that "asbestos litigation has reached a magnitude, not contemplated in the record before us in 1977, that threatens the administration of justice and that requires a new, streamlined approach." *In re Asbestos Prod. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 418 (J.P.M.L. 1991). The Panel noted that the types of matters appropriate for consideration by the transferee court could include "exploring the opportunities for global settlements" and use of the MDL consolidation as a "vehicle leading to a single national class action trial." *Id.* at 420-21. The Panel noted that the transferee court should "fully explore the uniform use of dispositive techniques" including class actions and "pleural registries."[1] App. 32-33 (Order to Show Cause). Finally,

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[1] A few state courts have enacted programs called "pleural registries." Typically, "pleural registries" alter state substantive law by requiring that, in order to prosecute a claim for an asbestos-related injury, a plaintiff must satisfy certain objective medical criteria – such as having a defined level of lung impairment as measured by pulmonary function tests. For those claimants who have asbestos-related disease but do not meet the medical criteria (usually those with "pleural disease"), the pleural registry acts to toll the statute of limitations, in case they later develop a qualifying disease that permits them to prosecute a claim. *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J. L. & Public

the Panel encouraged the transferee court to act as a "focal point to facilitate coordination with the mammoth number of asbestos actions pending in state courts." *Id.*

C. The Transferee Court's Efforts to Coordinate Global Negotiations Have Failed.

Immediately following the transfer, Judge Weiner organized plaintiffs' and defendants' steering committees and directed the lawyers to negotiate a global settlement of all asbestos claims, present and future. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 599-600 (1997). In November 1991, the Defendants' Steering Committee in MDL 875 made a lump sum offer to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected the offer, and "negotiations fell apart." 521 U.S. at 600. Subsequently, a group of 20 asbestos defendants collectively known as the Center for Claims Resolution ("CCR") approached certain members of the Plaintiffs' Steering Committee to negotiate a "settlement class action" that would resolve all

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Policy 541, 542 (1992). Proponents of pleural registries, including Professor Schuck, often refer to the programs as "deferring" the claims of plaintiffs that do not qualify. This is misleading, since the claims that fail to qualify are not, in fact, deferred for later resolution – instead, claimants lose any right to prosecute a claim for non-qualifying injuries, despite the fact that such injuries would otherwise be compensable under applicable substantive law. Those claimants can prosecute a claim only if they later develop a more severe injury that *does* meet the registry's medical criteria.

future asbestos claims against the CCR defendants. The plaintiffs' attorneys agreed to the concept, and their discussions finally led to the proposed class settlement in *Amchem*. However, as with the earlier global negotiations between the Plaintiffs' and Defendants' Steering Committees, the *Amchem* settlement ultimately failed as a result of the unique, disparate interests of the individual plaintiffs encompassed by the negotiation. This Court rejected the *Amchem* settlement because "[g]iven the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard." *Amchem*, 521 U.S. at 624.

D. Current Discovery and Settlement Activities in MDL 875 Are Entirely Plaintiff-Specific.

Since the "global" negotiations among all plaintiffs and defendants broke down in 1991, the transferee court in MDL 875 has not overseen any common discovery, decided or been presented with any common legal issues, or facilitated any negotiations common to all actions. Instead of conducting such "coordinated or consolidated pretrial proceedings," the transferee court has instead presided over discovery and settlement negotiations in discrete groups of cases involving individual plaintiffs' firms, and issued rulings on plaintiff-specific motions that raise unique issues of law and fact. As a practical matter, the transferee court now acts as nothing more than a facilitator of a centralized, mandatory, alternative

dispute resolution system for *ad hoc* resolution of the highly-individualized claims of asbestos personal injury victims. The court has issued several pretrial and administrative orders in MDL 875 that are applicable to all actions, but those orders do nothing more than establish procedures for completion of discovery and settlement negotiations with respect to *individual* cases.

During the nearly nine-year pendency of MDL 875, neither the plaintiffs nor the defendants have attempted to conduct *any* discovery that is common to most, let alone all, cases. App. 46 (Baron Aff.). The transferee court has not made any global legal rulings applicable to all cases, and none of the parties has even contended that any common issues of law or fact exist. *Id.* Indeed, MDL 875 has so far devolved into piecemeal proceedings that the Plaintiffs' Steering Committee has not even met since 1993. *Id.* Nothing in MDL 875 is any more "coordinated or consolidated" than any other two cases that are subject to the same local rules and procedures established by a single district or district court judge. *See, e.g.*, Civil Justice Expense and Delay Reduction Plan of the United States District Court for the Eastern District of Texas, Art. 6(2) (establishing standard pre-trial orders applicable to cases following certain "tracks").

Rather than avoiding duplication of judicial resources by facilitating common discovery or resolving common legal issues, MDL 875 has instead been used as a means to protect the resources of asbestos defendants. Judge Weiner has both publicly and privately repeated that he is unwilling to remand cases to their originating courts for trial "unless the claimant was seriously ill or dying and all avenues of settlement were exhausted. . . .

The court advised counsel that motions to remand involving other circumstances would only serve to deplete resources otherwise available for settlements and thus would be routinely denied." App. 40 (Mem. Op. in *Carlough*). Even in those rare cases in which the transferee court has suggested remand, the court has softened any potential blow to defendants' assets by purporting to "sever" and "retain jurisdiction" over punitive damages claims. App. 38, Administrative Order No. 3, MDL 875 (August 1992) ("The issue of punitive damages must be resolved at a further date with regard to the entire MDL action, and therefore any claims for punitive or exemplary damages will be severed from such [remanded] cases and retained by the Court within its jurisdiction over MDL 875 in the Eastern District of Pennsylvania").

E. Procedural History

For the Petitioners here, as well as thousands of other asbestos victims, the ongoing story of MDL 875 has simply been that they have been unable to secure justice. The Petitioners now before this Court fall into three groups:

1. The New York Petitioners[2]

Eighty-eight of the Petitioners here originally filed their asbestos-related personal injury lawsuits in the Northern District of New York between 1987 and 1991. Petitioners' injuries range from the invariably fatal cancer mesothelioma, for which asbestos is the only known

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[2] A list of all Petitioners and the group into which they fall is found at App. 77.

cause, to pleural disease, a non-malignant scarring of the lining of the lung from asbestos exposure. Of the New York Petitioners, 4 were victims of mesothelioma, 19 had asbestos-related lung cancer, 7 had other forms of asbestos-related cancer, 31 had asbestosis, 3 had pleural disease, and 26 are spouses with claims for loss of consortium. At least 23 of the New York Petitioners have died as a result of asbestos-related injuries, including four who have died during the seven and a half year period since their cases were transferred to MDL 875. In addition to the four New York Petitioners who have died directly from asbestos-related conditions during the pendency of MDL 875, another six of the New York Petitioners have died (either from their asbestos injury or other causes) during that same period of time. *See* App. 65-66 (Supp. Aff. of Steve Wolens at ¶ 3).

The claims of the New York Petitioners are not much closer to resolution today then they were when they were originally transferred to MDL 875 in 1991. Each of these New York plaintiffs originally filed responses to Defendants' discovery requests prior to the summer of 1991, when MDL 875 was created and their cases were first transferred. Those discovery responses included such client-specific information as medical records, work history, and a list of products to which these plaintiffs were exposed. Since 1991, these New York Petitioners have supplemented their answers to discovery on several occasions, including as recently as April 1998. The New York Petitioners have repeatedly attempted in good faith to settle their claims with all defendants, but have been unable to do so absent some possibility of obtaining a trial setting. App. 67 (Supp. Affidavit of Steven Wolens at

¶ 6). Those defendants who have refused to settle with Petitioners have in many cases failed to make *any* monetary offer, and in all cases have failed to offer sums that approach historical settlement values for similarly situated claimants. *Id.*

The New York Petitioners have not only suffered a tragedy of indefinite delay as a result of the MDL, but their own underlying claims tell separate tragic stories. For example, Petitioner Joann Patenaude lost her husband Robert to mesothelioma when he was only 46 years old. Although Joann was 80 percent dependent on her husband's income at the time of his death in 1983, she has struggled on her own for the intervening 15 years, having lost both a husband and the source of her financial security. Robert Patenaude's lost wages as a result of his asbestos-related cancer are approximately $590,000. App. 66 (Supp. Affidavit of Steven D. Wolens at ¶ 4). Similarly, Pauline Edwards lost her husband George LaClaire to asbestos-related lung cancer in 1986 when George was only 40 years old. George LaClaire's lost wages are approximately $728,000. *Id.* Although such "economic" damages cannot begin to measure the full extent of these Plaintiffs' losses, and do not account for the horrible suffering that their husbands endured while they still lived, they at least provide some indication of the magnitude of their injuries, which have gone without redress during the pendency of MDL 875.

In March 1998, the New York Petitioners moved the transferee court for suggestion of remand of their cases for trial in the originating court in the Northern District of New York. Because the transferee court had not yet acted on the motion as of November 1998, Petitioners

then filed a motion for remand of their cases with the Judicial Panel on Multidistrict Litigation. The Panel denied their motion for remand on February 5, 1999, *see* App. 58, and they now seek a writ of mandamus from this Court directing the Panel to remand their cases.

2. The Georgia Petitioners

The Georgia Petitioners are 61 plaintiffs who filed their asbestos-related personal injury and death claims in the Northern District of Georgia between 1987 and 1991. The story of their experience in MDL 875 is virtually identical with that of the New York Petitioners. Three of the Georgia Petitioners suffered from mesothelioma, three were victims of asbestos-related lung cancer, 50 have asbestosis, and four are spouses who have claims for loss of consortium. Twenty of the Georgia Petitioners have died as a result of their asbestos-related injuries, including fourteen who have died since their cases were transferred to MDL 875. *See* App. 66-67 (Supp. Aff. of Steve Wolens at ¶ 5).

As with the New York Petitioners, the claims of the Georgia Petitioners have made little to no progress toward resolution for more than seven years. Despite these plaintiffs' efforts to comply with all relevant court orders, to provide all requested information to the defendants, and to conduct settlement negotiations in good faith, these actions remain unresolved. App. 67 (Supp.Wolens Aff. at ¶ 6). After several formal settlement conferences and countless attempts at informal negotiations failed to lead to settlement of their claims, the Georgia Petitioners filed motions to suggest remand with

the transferee court on April 29 and May 5, 1998. As of November 1998, the transferee court had not acted on those motions, and the Georgia Petitioners filed a motion to remand with the Judicial Panel on Multidistrict Litigation. The Panel denied their motion for remand on February 5, 1999, *see* App. 58.

3. The Oregon Petitioners

The Oregon Petitioners are plaintiffs in 67 asbestos-related personal injury actions that were originally filed in the district of Oregon between 1989 and 1996. Since having their cases transferred to MDL 875, the Oregon Petitioners have repeatedly sought to resolve their claims, without any success. Over a seven-year period, the Oregon Petitioners have filed at least seven motions for suggestion of remand with the transferee court, each time without success. Throughout the two-year period from 1995 to 1997, the Oregon Petitioners' counsel attended settlement conferences, complied with all orders of the transferee court, and in good faith sought to settle Petitioners' cases. App. 69-70 (Aff. of Jeffrey S. Mutnick). Although the transferor district court in Oregon typically resolved asbestos cases within one year of filing prior to the establishment of MDL 875, such claims now languish for years in the transferee court, without any hope of reaching trial. *Id.* Without a trial date, Petitioners' counsel have been unable to reach settlements with defendants. *Id.* In 1998, the Oregon Petitioners filed a motion for remand with the Panel on Multidistrict Litigation, which denied the motion because Judge Weiner had declined to suggest remand. App. 48. Since the Panel's denial of remand, Judge Weiner has ordered additional settlement

conferences, which have failed to resolve the cases. App. 71.

4. The Mandamus Proceeding

On June 29, 1999, Petitioners collectively filed a petition for writ of mandamus in the Third Circuit court of appeals, seeking an order directing the Judicial Panel on Multidistrict Litigation to carry out its statutory obligation to remand under 28 U.S.C. § 1407(a). The Third Circuit ordered full merits briefing and the case was orally argued on January 28, 2000. On April 11, 2000, the Panel issued its decision denying mandamus, and the court denied Petitioners' timely petition for rehearing on May 24, 2000.

In denying mandamus, the court of appeals held that "the individual settlement negotiations and conferences that are occurring in plaintiffs' cases are in fact 'coordinated' proceedings" within the meaning of 28 U.S.C. § 1407(a), App. 17, apparently because the overall purpose of MDL 875 is to "coordinate" resolution of all asbestos cases in federal courts. Thus, despite Petitioners' uncontested showing that no issues remain to be resolved with respect to their individual claims that are commonly shared with other claims that have been transferred to MDL 875, the court of appeals nonetheless held that Petitioners' claims are subject to ongoing "coordinated pretrial proceedings" simply because other asbestos cases are also encompassed under the same MDL umbrella.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision "Conclusively Thwarts" the Panel on Multidistrict Litigation's Statutory Obligation to Remand Cases under 28 U.S.C. § 1407(a).

This Court should grant certiorari because the court of appeals has effectively rewritten the Multidistrict Litigation statute to eliminate the requirement that the Judicial Panel on Multidistrict Litigation remand "each action" that has been transferred upon completion of "coordinated or consolidated" pretrial proceedings. In so doing, the court of appeals got the law exactly backward – blatantly disregarding the central basis for this Court's opinion in *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998), while wresting out-of-context quotes from portions of that decision discussing arguments that this Court explicitly rejected. Contrary to *Lexecon*, the court of appeals' expansive interpretation of 28 U.S.C. § 1407(a) would "conclusively thwart" the Panel's statutory obligation to remand. *Id.* at 36. This judicial revision of the MDL statute will not only deny access to the courts for Petitioners and other asbestos claimants, but also for thousands of other claimants whose cases have been transferred under section 1407.

Petitioners are individual asbestos personal injury and wrongful death claimants whose cases were transferred years ago for coordinated and consolidated pretrial proceedings in MDL 875. As the court of appeals acknowledged, Petitioners' claims are no longer the subject of any discovery of issues common to other claims in

MDL 875, or of any global or common settlement discussions taking place in MDL 875. App. 22. While the transferee court continues to supervise discovery efforts regarding so-called "litigation screenings," those efforts are not "common issue" discovery, and, as the court of appeals recognized, those efforts do not apply to Petitioners' claims. App. 17. The only remaining activity of the transferee court with respect to Petitioners' claims involves individual settlement conferences and negotiations – and as Petitioners have consistently indicated in their efforts seeking remand, Petitioners' repeated, good faith efforts to settle their claims with all defendants have failed due to the lack of a trial setting. Because neither the transferee court nor the MDL Panel would release them from the indefinite purgatory of MDL 875, Petitioners brought this mandamus proceeding to enforce 28 U.S.C. § 1407(a)'s plain command that "[e]ach action" transferred for coordinated and consolidated pretrial proceedings "shall be remanded by the [MDL] panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred."

In *Lexecon*, this Court rejected a "broad reading of a court's pretrial authority" under section 1407, 523 U.S. at 37, in deference to "the straightforward language imposing the [MDL] Panel's responsibility to remand." *Id.* at 40. In that case, the transferee court had relied on 28 U.S.C. § 1404 as an independent source of authority to refer an MDL case to itself for trial. *Id.* at 32. According to the reasoning of the respondents in *Lexecon*, nothing in section 1407(a) expressly limited the power of the transferee court to invoke section 1404, and the transfer order under section 1404(a) did not exceed the transferee court's

authority over "pretrial proceedings" because it was a "classic pretrial" order. *See id.* at 34.

To determine whether the transferee court had the power to transfer the case to itself for trial, this Court first examined the implications of the term "coordinated and consolidated pretrial proceedings" in isolation from the remainder of section 1407. *Id.* at 33-34. Read "so broadly as to reach its literal limits," the phrase "coordinated and consolidated pretrial proceedings" would "allow[ ] a transferee court's self-assignment to trump the provision imposing the [MDL] Panel's remand duty." *Id.* at 35. This Court rejected such a broad interpretation, however, recognizing that the phrase "coordinated and consolidated pretrial proceedings" must be read in conjunction with the provision creating the MDL Panel's obligation to remand each action. *Id.* That provision uses mandatory language that "normally creates an obligation impervious to judicial discretion." *Id.* "If we do our job of reading the statute whole," this Court explained, "we have to give effect to this plain command." *Id.* Doing so, this Court concluded that a transferee court has no power to grant a venue transfer under section 1404. *Id.* at 40-41.

Remarkably, the court of appeals' opinion in this case relies on *Lexecon* for the proposition that "the phrase 'coordinated or consolidated' is to be interpreted broadly." App. 14. Citing only to the first portion of the *Lexecon* analysis – in which this Court explained what the statute would mean if read "so broadly as to reach its literal limits" – the court of appeals concluded that "a proceeding that relates only to a single individual's case or claim can nonetheless be coordinated" for purposes of the statute. App. 17. The court of appeals next attached

the same broad meaning to "pretrial proceedings" that this Court initially considered in its discussion – essentially, any action a district court can take prior to trial – concluding as a result that ongoing individual settlement conferences are pretrial proceedings that can postpone the obligation to remand. App. 17. The court of appeals' opinion fails to acknowledge that the Supreme Court *rejected* such a broad derivation of pretrial authority from the term "coordinated and consolidated pretrial proceedings," calling the *same* interpretation applied by the panel in this proceeding "flatly at odds" with the statutory obligation to remand. 523 U.S. at 35.

The court of appeals' opinion does not merely disregard this Court's explicit reasoning in *Lexecon* – it emasculates the mandatory remand obligation at the heart of the Court's decision. Section 1407(a) refers to the MDL Panel's independent obligation to remand "each action" that has been transferred when coordinated or consolidated pretrial proceedings have been completed, rather than globally requiring the transferee court to remand "all actions" at once. Yet under the court of appeals' reading of section 1407(a), the MDL Panel merely "*has the discretion* to remand a case when everything that remains to be done is case-specific." *See* App. 20-21 (emphasis added). By contrast, according to the court of appeals, the MDL Panel's *obligation* to remand – which is "impervious to judicial discretion," 523 U.S. at 35 – does not arise with respect to *any* case until *all* cases before the transferee court have been resolved. For Petitioners and for thousands of other asbestos claimants in MDL 875, this means that the Panel's obligation to remand will not arise for the indefinite future, since thousands of cases are currently

pending before the transferee court, and a continuous stream of new cases are transferred to MDL 875 as more workers develop and discover their asbestos-related injuries.

Moreover, this Court should also correct the court of appeals' expansive construction of "coordinated or consolidated pretrial proceedings" because it expands the boundaries of the Multidistrict Litigation statute far beyond its original purposes. "The purpose of the statute is to conserve judicial resources by avoiding the waste of duplicative pre-trial proceedings." 17 JAMES W. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE, § 112.04[1][b], at 12-38 (3d ed. 1999). Thus, when read in concert with the overall intent of the statute, "coordinated or consolidated pretrial proceedings" refers expressly to pretrial proceedings that are *common* to all transferred cases.[3] Obviously, individual settlement negotiations in individual cases, even to the extent they can be characterized as "pretrial proceedings" at all, do nothing to avoid duplicative efforts. Contrary to the court of appeals' view, App. 17, such individual case negotiations do not involve coordination

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[3] Petitioners acknowledge that the term "pretrial proceedings" encompasses more than merely discovery. *See, e.g., Humphreys v. Tann*, 487 F.2d 666, 667 (6th Cir. 1973). This does not change the fact that Congress intended the term "*coordinated or consolidated* pretrial proceedings" to be limited to the conduct of certain discovery or other pretrial proceedings that would apply to *all* transferred cases on a global basis. Merely because a court is conducting individual pretrial proceedings in certain cases does not mean that such proceedings are "coordinated or consolidated."

of *any* common or overlapping issues that would be duplicative for all cases.

II. Certiorari Provides the Only Means by which Petitioners Can Gain Access to the Courts.

If this Court fails to grant certiorari here, Petitioners and hundreds of other similarly-situated asbestos claimants stuck in the black hole of MDL 875 will have no means available to them to secure their right to a day in court. They have waited for years. They have followed the rules that the transferee court has established, and they have attempted in good faith to resolve their cases by settlement. Their stalwart efforts to reach such settlements have failed, at least with respect to their claims against certain defendants. They have watched helplessly as their co-workers and others who became ill from asbestos exposure after them received relief from claims filed in state courts. Petitioners have repeatedly asked the transferee court to suggest remand, both formally and informally. They have moved the MDL Panel to exercise its obligation to remand, and they have asked the court of appeals to enforce that statutory command. Still, they will have no foreseeable opportunity to get their day in court, unless this Court grants this petition for certiorari.[4]

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[4] The court of appeals claimed that Petitioners had another "practical and untried avenue for seeking relief" because their counsel's affidavit regarding their inability to settle the cases was not presented to the transferee court or the JPML. App. 13-14 n.4. This is ridiculous. In fact, the difference between the second supplemental affidavit submitted to the court of appeals and the affidavits presented to the transferee court and MDL

Although the issuance of a writ of mandamus is an extraordinary remedy, it is generally available "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its power when it is its duty to do so." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978). "Mandamus is appropriate when an official's duty to act is ministerial in nature and so plain as to be free from doubt. Even where an official's responsibilities are in some respects discretionary, mandamus is appropriate if 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised . . . have been ignored or violated.' " *Silveyra v. Moschorak*, 989 F.2d 1012, 1014-15 (9th Cir. 1993) (ellipsis in original) (quoting *Carpet noleum and Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)). "The two prerequisites for the issuance of a writ of mandamus are that the petitioners have no other adequate means to obtain the relief sought and that they have shown that their right to the writ is clear and

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Panel was nothing more than window dressing. Although the second supplemental affidavit explicitly stated that defendants' counsel had conclusively represented that they would not settle cases without a trial setting, there were very similar statements in the affidavits before the transferee court and MDL Panel. Both affidavits presented to the lower courts stated that counsel had attempted on many occasions in good faith to settle the cases, that the unsettled defendants had in many instances failed to respond with *any* monetary offer, and that in all instances defendants failed to generate offers approaching historical settlement values for similarly-situated plaintiffs. *See, e.g.* App. 43 (Affidavit of Steve Wolens at ¶ 3). For the court of appeals to suggest that such a slight alteration in wording would have changed the outcome before the Panel or transferee court is a flight of fancy.

indisputable." *Kerr v. United States District Court*, 426 U.S. 394 (1976).

Here, Petitioners have a "clear and indisputable" right to mandamus because the Judicial Panel on Multidistrict Litigation has failed to exercise its statutory duty to remand Petitioners' claims to their originating district courts pursuant to 28 U.S.C. § 1407(a), now that all "coordinated or consolidated pretrial proceedings" have been completed in MDL 875. The Panel's statutory duty to remand under these circumstances is "impervious to judicial discretion," *Lexecon*, 523 U.S. at 35, and the MDL enabling statute itself provides that extraordinary writs are the *only* means for review of the Panel's orders. 28 U.S.C. § 1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code"). Unless this Court grants their petition, Petitioners will be unable to enforce the Panel's statutory obligation to remand, and their cases will remain indefinitely mired in MDL 875.

CONCLUSION

This Court should grant the petition for certiorari to correct the court of appeals' gross misinterpretation of the MDL statute, which will result in a denial of access to the courts not only for these Petitioners and hundreds of other asbestos claimants stuck in MDL 875, but also for

thousands of other plaintiffs whose claims have been transferred to other courts under 28 U.S.C. § 1407.

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-1540

IN RE: JOANN PATENAUDE, et al.

Petitioners

On Petition for Writ of Mandamus from
Order Denying Motion to Remand of the Judicial Panel
on Multidistrict Litigation
(Related to D.C. No. MDL 875)

Argued January 28, 2000

BEFORE: GREENBERG, ROTH and STAPLETON,
Circuit Judges

(Opinion filed April 11, 2000)

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OPINION

STAPLETON, *Circuit Judge*:

Petitioners are three groups of plaintiffs seeking damages for personal injury and wrongful death as a result of exposure to asbestos. Respondents are some of the defendants in some of the cases brought by the plaintiffs. The plaintiffs' claims were initially filed in the Northern District of New York (the "New York plaintiffs"), the Northern District of Georgia (the "Georgia plaintiffs") and the District of Oregon (the "Oregon plaintiffs"). Pursuant to 28 U.S.C. § 1407(a), the plaintiffs' claims were transferred by the Judicial Panel on Multidistrict Litigation (JPML) to Multidistrict Litigation No. 875 ("MDL No. 875"), which is pending in the United States District Court for the Eastern District of Pennsylvania (the "transferee court").

At various times during the past seven years, some of the Oregon plaintiffs have filed motions for suggestion of remand with the transferee court. The last such motion was filed in May 1997. Receiving no response, in May 1998 counsel for the Oregon plaintiffs appeared before the JPML to seek remand. On May 20, 1998, the JPML denied the Oregon plaintiffs' motion to remand.

Some, but not all, of the New York plaintiffs filed motions for a suggestion of remand with the transferee court in March 1998. By October 1998, the transferee court still had not acted on the motions, and ten of the New York plaintiffs filed a motion for remand with the JPML.

In December, the New York plaintiffs filed a motion to clarify explaining that the prior motion to remand sought remand of *all* claims of *all* the New York plaintiffs, and not just the ten who had originally filed.

Some, but not all, of the Georgia plaintiffs filed motions for a suggestion of remand with the transferee court in April and May of 1998. In September 1998, the transferee court still had not acted on the motions for suggestion of remand, and all of the Georgia plaintiffs filed a motion for remand with the JPML. On February 5, 1999, the JPML 3 denied the New York and Georgia plaintiffs' motions for remand.

On June 29, 1999, all of the plaintiffs filed a petition for writ of mandamus asking this Court to order the JPML to remand their cases. We will deny the petition.

The parties have submitted affidavits that establish the following undisputed facts. The New York and Georgia plaintiffs' injuries range from the invariably fatal cancer mesothelioma, for which asbestos exposure is the only known cause, to pleural disease, a non-malignant scarring of the lining of the lung. Many have died from asbestos-related injuries, a good number of them during the pendency of MDL 875. The Oregon plaintiffs' injuries include malignancies and non-malignancies.

Following the creation of MDL 875, plaintiffs' and defendants' steering committees were organized that attempted to negotiate a global settlement of all asbestos claims. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 599-600 (1997). These negotiations, however, eventually "fell apart." *Id.* at 600. The Plaintiffs' Steering Committee (PSC) has not met since 1993, and has been completely

inactive.[1] Subsequently, twenty defendants and certain former members of the PSC proposed the settlement class action that was at issue in *Amchem*. *See id.* at 600-01. The Supreme Court, however, rejected the class certification "[g]iven the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions." *Id.* at 624.

The affidavits assert that during the seven year pendency of MDL 875, "no common or global discovery has been sought or conducted by either Plaintiffs or Defendants in this action, and no common questions of law or fact have been the subject of global resolution by [the transferee] Court." (A. 16-17). Since 1991, all discovery, settlement or other litigation activity in MDL 875 has related either to the *Amchem* class action or to individual claims or groups of claims. In the past two years, the transferee court has overseen broad discovery regarding litigation screening companies, the physicians they employ, and the nature of their contracts with plaintiffs' firms.

Since the creation of MDL 875, the New York and Georgia plaintiffs have supplemented their answers to

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[1] Although Defendant Owens-Illinois asserts that numerous members of the PSC met with defendants' representatives in 1999 and discussed the content of the master case management orders that various transferor courts should enter into were MDL 875 to disband, that meeting was never endorsed, organized or convened as a PSC gathering, nor was correspondence regarding the meeting issued to the full membership of the PSC, nor was it understood in advance that MDL 875 was even on the agenda for the meeting.

discovery on several occasions including as recently as April 1998, when they provided "updated information regarding their work history and exposures to Defendants' asbestos-containing products, and any new information regarding their medical status."[2] (A. 61). Their claims have also "been the subject of numerous settlement conferences conducted by the transferee court." (A. 61). Counsel for the New York and Georgia plaintiffs have submitted sworn affidavits stating that "with the exception of settlements of some plaintiffs' cases with some defendants, the settlement discussions have not resolved the cases." (A. 61). They further state that "in many instances, Defendants have failed to generate any monetary offer to settle Plaintiffs' cases; and in remaining cases, the Defendants have failed to offer settlement amounts that approach historical settlement values for similar claims." (A. 61).

Summaries of the New York docket sheets, however, reflect that individual plaintiffs have settled with anywhere from one to eleven defendants for amounts ranging from $3,500 to $739,136. The plaintiffs respond with an affidavit explaining that these settlement figures are inaccurate, in that they reflect gross amounts of settlement with the Johns Manville bankruptcy trust, even though plaintiffs will receive only ten per cent of that money, and in that they occasionally reflect double counting of settlements. The plaintiffs do not provide settlement information of their own, however, and, even accounting for these inaccuracies, the number and

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[2] Their original answers were filed prior to the inception of MDL 875.

amount of settlements have in many cases been substantial. Moreover, other additional settlements may well have been signed, as the docket summaries show significant delays (in some cases, five years) between settlements being signed and their being entered on the docket. *See also In re Asbestos Products Liability Litig.*, 1996 U.S. Dist. LEXIS 13850, at *3 (E.D. Pa. Sept. 16, 1996) (of the 22,000 open cases on the docket in 1996, thousands were resolved but not yet dismissed and statistically removed). The New York docket summaries show that in each of the New York plaintiffs' cases, anywhere from two to eighteen defendants remain, with the average number being approximately eleven.

Neither party has provided information regarding the settlement status of the Georgia or Oregon plaintiffs' individual claims. The plaintiffs do indicate that the Georgia docket sheets show between one and five defendants remaining on each individual claim. Also, counsel for the Oregon plaintiffs indicates that prior to the establishment of MDL 875 the average length of time for resolution of an Oregon case was less than one year, whereas in MDL 875 the average exceeds five years. Although settlement conferences were held regarding the Oregon cases in 1995, 1996 and either 1998 or 1999, plaintiffs' efforts at settlement have been "to little avail." (A. 115-16).

The transferee court has stated, although not in the context of the plaintiffs' particular claims, that among its "overriding objectives" "[t]hroughout the course of the multidistrict litigation" is the court's "considered judicial opinion that the sick and dying, their widows and survivors should have their claims addressed first." *Carlough*

v. Amchem, No. 93-215, at 8 (E.D.Pa. Apr. 15, 1993) (Mem.Op.). The court explained that it "steadfastly resisted motions to remand cases back to transferor courts unless the claimant was seriously ill or dying and all avenues of settlement were exhausted."[3] *Id.* The court has also "advised counsel that motions to remand involving other circumstances would only serve to deplete resources otherwise available for settlements and thus would be routinely denied." *Id.*

The transferee court's Administrative Order No. 3, which relates to all asbestos actions, reflects this policy. This Order establishes that in attempting to resolve cases through negotiation, cases of mesothelioma and lung cancer with asbestosis will be "address[ed] . . . on a priority basis." (A. 47-48). However, the court cautioned that "special efforts to resolve hardship cases are not a substitute for broad-based negotiations designed to reduce docket the [sic] backlog." (A. 47). The Order establishes the procedures for exchange of information and negotiation to be followed in MDL 875. If this process does not produce a resolution, "the Court shall determine whether the matter is appropriate for immediate remand of the plaintiff's compensatory damages claims." (A. 50). The Order states that only when all priority cases have been addressed will the court consider applying similar procedures to address cases of other malignant conditions

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[3] The court also has a practice when it does remand cases of severing and retaining jurisdiction over punitive damages claims. (A. 59). However, this has not happened in any of the plaintiffs' cases, and thus is not an issue for consideration on this appeal.

and asbestosis and that "[a]s to cases that involve non-malignant conditions other than asbestosis, the Court intends to establish an inactive docket." (A. 53).

This process has resulted in numerous cases being resolved. As of late 1996, some 62,000 cases had been assigned to MDL 875 and approximately 40,000 had been resolved. *See In re Asbestos Products Liab. Litig. (No. VI)*, 1996 U.S. Dist. LEXIS 13850, at *3 (E.D.Pa. Sept. 16, 1996) (Mem.Op.). The remaining 22,000 cases included thousands of cases that had been resolved but not yet dismissed. *See id.* As of January 1999, nearly 60,000 cases had been closed. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, No. 875, at 2 (JPML Feb. 5, 1999) (unpublished order denying remand). Thus, in 1997 and 1998, the transferee court closed nearly 10,000 cases a year.

This process has also resulted in approximately 1,000 actions or claims being remanded to the transferor courts. *See id.*

Plaintiffs' claims are all diversity actions brought in federal district court under 28 U.S.C. § 1332. These claims were transferred by the JPML to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1407. The JPML had jurisdiction to consider plaintiffs' motions to remand their actions to the transferor courts under 28 U.S.C. § 1407(a). This Court has jurisdiction to review the JPML's denial of remand pursuant to 28 U.S.C. § 1407(e). Section 1407(e) provides that JPML orders may be reviewed only by extraordinary writ pursuant to 28 U.S.C. § 1651.

I.

"Traditionally, the writ of mandamus has been used 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *E.g., In re Chambers Dev. Co.*, 148 F.3d 214, 223 (3d Cir. 1998) (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978)). "The writ is a drastic remedy that 'is seldom issued and its use is discouraged.' " *Id.* (quoting *Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988)). The writ of mandamus should only be granted "in response to an act amounting to a judicial usurpation of power." *Id.* (quoting *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 462 (3d Cir. 1996)).

Two prerequisites for issuance of a writ are: "(1) that petitioner have no other adequate means to attain the desired relief, and (2) that petitioner meets its burden of showing that its right to the writ is clear and indisputable." *Id.* (quoting *Hahnemann Univ. Hosp.*, 74 F.3d at 462). The petitioners have the burden of proving these two prerequisites. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989). As to the first prong, where there are practical avenues for seeking relief that are untried, this Court will ordinarily deny a petition for mandamus. *See Hahnemann Univ. Hosp.*, 74 F.3d at 461 ("[W]here interlocutory appeal seems a practical but untried avenue, we will ordinarily deny a petition for mandamus."). However, formal exhaustion of futile remedies is not required. *See id.* at 462 (granting mandamus despite petitioner's failure to make a formal application for certification of an interlocutory appeal where an informal application had been made and not granted). As to the second prong, where a court commits a clear error of law, a right to relief is clear and

indisputable. *See Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994). Moreover, mandamus can apply to discretionary acts where petitioners can demonstrate a "clear abuse of discretion." *Mallard*, 490 U.S. at 309.

"Even when these requirements are met, issuance of the writ is largely discretionary. . . . " *In re Chambers Dev. Co.*, 148 F.3d at 223. "[I]t is within a court's discretion to refrain from issuing the writ even when the requirements for mandamus are technically satisfied. The availability of the writ 'does not compel its exercise.' " *Id.* (quoting *Lusardi*, 855 F.2d at 1070).

In the instant case, ordinary appeal is not available; section 1407(e) provides that "[n]o proceedings for review of the panel may be permitted except by extraordinary writ." 28 U.S.C. § 1407(e). Nonetheless, some of the plaintiffs have other practical means to obtain the relief sought. Those plaintiffs who did not seek a suggestion of remand from the transferee court before filing their motion to remand with the JPML have a practical but untried avenue for relief available to them. While it is true that plaintiffs are not required to seek a suggestion of remand prior to filing a motion to remand with the JPML, *see* JPML Rule 7.6(c), the JPML Rules state that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." JPML Rule 7.6(d). In view of this reluctance and the "great weight" that the Panel has consistently given to the transferee judge's determination that remand is appropriate, *In re King Resources Co. Sec. Litig.*, 458 F.Supp. 220, 222 (JPML 1978), it is possible that were the plaintiffs to

obtain a suggestion of remand from the transferee court, the JPML would grant their motions for remand.

The plaintiffs argue that there was no point in seeking a suggestion of remand from the transferee court, given that it had not issued such a suggestion for other plaintiffs grouped in their respective cause numbers who did seek such suggestions. They argue that the grounds for seeking remand were identical for all petitioners. However, a determination that coordinated or consolidated pretrial proceedings have concluded and that remand is therefore appropriate is necessarily case-specific. Within each group, plaintiffs have had differing rates of success in settling claims and plaintiffs have experienced different injuries and therefore are impacted differently by the priority policy reflected in Administrative Order No. 3. Merely because some plaintiffs have had their requests for suggestions of remand go unanswered does not mean that it is futile for other plaintiffs to make such requests. Indeed, the transferee court has suggested remand in close to 1000 cases. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, No. 875 (JPML Feb. 5, 1999) (unpublished order denying remand).

Thus, only those plaintiffs who actually sought suggestion of remand from the transferee court have satisfied the first prong of the mandamus inquiry.

II.

The remaining plaintiffs have not demonstrated a clear and indisputable right to remand. Section 1407(a) provides that:

> When civil actions involving one or more common questions of fact are pending in different districts, *such actions may be transferred to any district for coordinated or consolidated pretrial proceedings*. Such transfers shall be made by the judicial panel on multidistrict litigation . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. *Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings* to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407(a) (emphasis added). Thus, the statute imposes two limitations on the kinds of proceedings that the transferee court may conduct: they must be (1) coordinated or consolidated and (2) pretrial. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33-34 (1998). Moreover, the statute "obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course," which obligation is "impervious to judicial discretion." *Id.* at 34-35. The plaintiffs acknowledge that individual settlement negotiations and discovery continue in MDL 875 and the docket sheets show a pattern of settlements continuing through 1999.[4] They argue,

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[4] Although the petitioners downplay the success of these settlement negotiations and state that results would have been

however, that individual settlement negotiations and discovery do not constitute "coordinated or consolidated pretrial proceedings," that all "coordinated or consolidated pretrial proceedings" have concluded, and that they therefore have a clear and indisputable right to relief.

The Supreme Court's decision in Lexecon indicates that the phrase "coordinated or consolidated" is to be interpreted broadly. *See id.* at 33-34. *Lexecon* was a suit for malicious prosecution, abuse of process, tortious interference, commercial disparagement and defamation arising out of the defendant law firm's conduct as counsel in a prior class action brought against the plaintiff Lexecon and others for violations of securities laws. *See id.* at 28-29. The class action against Lexecon had been transferred for coordinated and consolidated pretrial proceedings under § 1407(a) along with other cases arising out of the failure of Lincoln Savings and Loan. *See id.* at 29. During the pretrial proceedings, the class action plaintiffs and Lexecon reached a "resolution" under which the claims against Lexecon were dismissed. *See id.* Lexecon

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much quicker in their transferee districts, the standard for remand is that coordinated pretrial proceedings be concluded, not that they provide the quickest resolution of particular cases.

The petitioners' second supplemental affidavit suggests that settlement negotiations in fact are not ongoing in that the remaining defendants have stated conclusively that they will not settle until the cases are set for trial. This affidavit, however, was not presented to either the transferee court or the JPML. Therefore, insofar as the petitioner's claims are based on this evidence, they have a practical and untried avenue for seeking relief and mandamus will not issue.

then filed its malicious prosecution case, which was transferred by the JPML to the transferee court under § 1407(a), albeit to a different judge. *See id.* at 29-30. In transferring, the Panel noted that Lexecon's claims

> share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL-834 . . . [,] that . . . a massive document depository is located in the [transferee district] and . . . the Ninth Circuit has before it an appeal of an order . . . in MDL-834 which may be relevant to the Lexecon claims.

Id. at 30. Subsequently, however, the Ninth Circuit appeal was dismissed, the document depository was closed down, and the remaining parties to the Lincoln Savings litigation reached a final settlement on which final judgment was entered. *See id.* Lexecon then moved for suggestion of remand, which the law firm opposed because discovery was still incomplete. *See id.* The law firm filed a counter-motion requesting that the transferee court "transfer" the case to itself for trial under § 1404(a). *See id.* The transferee court deferred ruling on these motions for three months, until after summary judgment and Rule 54(b) final judgment had been entered on all but the defamation claim. *See id.* at 30-31. At that point, the transferee court granted the law firm's motion to assign the case to itself for trial and denied Lexecon's motion for suggestion of remand. *See id.* at 31.

The Court framed the issue as "whether § 1407(a) does permit a transferee court to entertain a § 1404(a) transfer motion to keep the case for trial." *Id.* at 32. The

Court stated that "[a]lthough [§ 1407(a)] limits a transferee court's authority to the conduct of 'coordinated or consolidated' proceedings and to those that are 'pretrial,' *these limitations alone raise no obvious bar* to a transferee's retention of a case under § 1404." *Id.* at 33-34 (emphasis added). The Court explained that "[i]f 'consolidated' proceedings alone were authorized, there would be an argument that self-assignment of one or some cases out of many was not contemplated, but *because the proceedings need only be coordinated, no such narrow limitation is apparent.*" *Id.* at 34 (emphasis added). Thus, a proceeding that relates only to a single individual's case or claim can nonetheless be coordinated. The Court elaborated, "While it is certainly true that the instant case was not consolidated with any other for the purpose literally of litigating identical issues on common evidence, it is fair to say that proceedings to resolve pretrial matters were 'coordinated' with the conduct of earlier cases sharing a common core . . . , *if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered.*" *Id.* (emphasis added). Even the fact that the case was being heard by a different judge, although it limited the prospects for coordination, did not eliminate them. *See id.* Neither, apparently, did the fact that all of the proceedings with which the individual action was "coordinated" had already concluded raise a bar. This is evident not only from the facts of the case, where all of the other cases had been reduced to final judgment when the case-specific motion was being considered, but also from the Court's use of the past tense in stating that it was enough that the case was "being brought before judges in a district where much of the

evidence was to be found [even though the evidence depository had been closed] and overlapping issues *had* been considered." *Id.* (emphasis added). Moreover, the case suggests that it is not necessary that any one issue be common to all cases, so long as issues "overlap." *Id.*

This passage cannot be reconciled with the plaintiffs' argument that "coordinated or consolidated pretrial proceedings" are concluded when the transferee court ceases to conduct proceedings that are common to all. To be coordinated, it is not necessary that common issues are being contemporaneously addressed. In the instant case, it seems probable that "much of the evidence," at least regarding causation, is to be found in the transferee district. *Id.* Furthermore, overlapping issues "ha[ve] been considered": the transferee court oversaw the initial attempts at global settlement and set forth procedures applicable to all regarding the mandatory exchange of information, the negotiation process, and the prioritizing of cases. Moreover, the transferee court continues to conduct discovery regarding the use of litigation screenings that overlaps many of the cases in MDL-875. Although there is no allegation that litigation screenings were conducted in any of the plaintiffs' individual cases, this issue is common to many cases from many different transferor districts. Thus, applying the reasoning of *Lexecon*, it appears that the individual settlement negotiations and conferences that are occurring in plaintiffs' cases are in fact "coordinated" proceedings.

Furthermore, such proceedings are "pretrial." "[P]retrial, as an adjective, means before trial – . . . all judicial proceedings before trial are pretrial proceedings." *In re Plumbing Fixture Cases*, 298 F.Supp. 484, 494 (JPML

1968); Wright et al., *Federal Practice and Procedure* § 3866 ("Interpreted literally, the transferee court appears to have control over all proceeding prior to trial[,]" including discovery motions, motions to amend, to dismiss, for summary judgment, and to determine class certification.). Rule 16 of the Federal Rules of Civil Procedure, relating to pretrial conferences, states that the court may require conferences before trial for the purpose of "facilitating the settlement of the case." Fed. R. Civ. Proc. 16(a)(5). Therefore, there is no basis for concluding that settlement conferences are not pretrial proceedings.

The legislative history of § 1407 also demonstrates that Congress intended transferee courts to have broad pretrial authority.

> By the term "pretrial proceedings" the committee has reference to the practice and procedure which precede trial of an action. These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure. Under the Federal rules the transferee district court would have authority to render summary judgment, to control and limit pretrial proceedings, and to impose sanctions for failure to make discovery or comply with pretrial orders.

H.R. Rep. No. 1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900; *see also* Multidistrict Litigation: Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, 89th Cong. 13 (1966) (testimony of Dean Neal) ("[T]he cases concerned would be brought within the control of a single district and so the very same powers provided by the Federal Rules of Civil Procedure should permit all of the

same kinds of steps to be carried out by the presiding district judge."). Although the legislative history does not specifically mention settlement, it does indicate that the Federal Rules provide the measure of a transferee court's pretrial authority, and the Federal Rules allow for conferences to facilitate settlement.

The plaintiffs point to legislative history stating:

> The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the "just and efficient conduct" of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management. To accomplish this objective the bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings.

H.R. Rep. 1130, 1968 U.S.C.C.A.N. at 1900. Centralized management of individual settlement negotiations is not inconsistent with the objective of providing "centralized management . . . to assure the 'just and efficient conduct' of . . . actions." *Id.* Such centralized management avoids "the possibility of conflict and duplication" of, if nothing else, the judge's time and energy spent becoming familiar with the recurring issues of asbestos litigation, the major players and how best to facilitate settlement with particular defendants.

The plaintiffs also point to legislative history suggesting that Congress contemplated that additional discovery might be conducted following remand as evidence

that such individual discovery is not appropriate for the transferee court. *See* Multidistrict Litigation: Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, 89th Cong. 56 (1966); H.R. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1901-02. The House Report states that "the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand . . . for this purpose is desirable." H.R. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1901-02. Furthermore, during the hearings, the following exchange occurred:

> SENATOR TYDINGS: The intent of the coordinating committee, . . . apparently, is that the necessary additional discovery with regard to issues of fact not national or not common to other cases could be conducted once the case was remanded. . . .
>
> Do you agree that the intent of the bill is to allow additional discovery after remand . . . , and if so, is the language of the legislation sufficiently broad to permit that?
>
> JUDGE MURRAH: Yes

Multidistrict Litigation: Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, 89th Cong. 56 (1966).

All of these statements speak in discretionary terms: what "in most cases" is "desirable," what the statute "allows," and what the transferee court "could" do. Section 1407 expressly allows for remand "at *or before* the conclusion of . . . pretrial proceedings." 28 U.S.C. § 1407(a) (emphasis added). Clearly, the Panel has the

discretion to remand a case when everything that remains to be done is case-specific. This does not mean that consolidated proceedings have concluded at the point that only case-specific proceedings remain; rather, the court can at that point exercise its discretion to remand "before the conclusion of pretrial proceedings." 28 U.S.C. § 1407(a).

For the same reason, the plaintiffs' citation to Panel decisions remanding cases prior to the conclusion of all pretrial proceedings is unavailing. *See In re Air Crash Disaster at Tenerife*, 461 F. Supp. 671 (JPML 1978); *In re Evergreen Valley Project Litig.*, 435 F. Supp. 923 (JPML 1977). In each of these cases, the Panel exercised its discretion to remand, based on its finding that remand "will serve the convenience of the parties and witnesses and will promote the just and efficient conduct of [the litigation]." *In re Air Crash Disaster*, 461 F. Supp. at 672. These remands were discretionary. In the instant case, where the possibility exists that even individual settlement negotiations will be more efficient if facilitated by a judge who is intimately familiar with the general issues and many of the parties, and where in fact the record reflects that settlements are successfully being negotiated, one cannot say that the Panel abused its discretion in refusing to remand.

Lexecon suggests another limitation on the transferee court's authority in addition to the requirement that proceedings be both coordinated and pretrial. *See Lexecon*, 523 U.S. at 34-39. After concluding that the requirement of "coordinated or consolidated" proceedings did not preclude the court from ruling on the transfer motion at

issue, the court stated that, "at first blush," the requirement of pretrial proceedings suggests no reason why the court could not rule on such a motion. *Id.* at 34. Ultimately, however, the Court concluded that a § 1404 transfer order was outside the scope of the transferee court's authority because a "necessary consequence of self-assignment by a transferee court [is that] it conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a)" to remand "at or before the conclusion of pretrial proceedings to the district from which it was transferred unless [the action] shall have been previously terminated." *Id.* at 36. In the instant case, however, conducting individual settlement conferences does not "conclusively thwart" the Panel's ability to remand. Unlike a § 1404 transfer, which makes it impossible for the Panel to remand even though the action has not been terminated, settlement negotiations will either be successful, in which case the action will terminate, or they will eventually conclude and the action can be remanded at that point.

In conclusion, because individual settlement negotiations and conferences are ongoing in the plaintiffs' individual cases, and because the transferee court is conducting discovery on overlapping issues that affect many asbestos cases, even if not the plaintiffs', coordinated pretrial proceedings have not concluded, and the plaintiffs have not demonstrated a clear and indisputable right to the relief they seek. Therefore the writ of mandamus will not issue.

III.

At times the plaintiffs appear to be arguing that the JPML abdicated its statutory duty when it relied on the fact that the transferee court had declined to issue a suggestion of remand as one basis for its own decision to deny the motion to remand. This policy is embodied in JPML Rule 7.6(d), which states that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." JPML Rule 7.6(c). Deference is not abdication, however, and the presence or absence of a remand recommendation from the transferee judge as a factor in the Panel's decision-making process seems to us entirely reasonable. Moreover, if plaintiffs had shown an abdication of statutory duty on the part of the Panel, it would not satisfy their burden of showing that they have a clear and indisputable right to the relief they seek, which is remand. To do that, they must clearly and indisputably show that coordinated pretrial proceedings have concluded in their cases, and that they have not done.

IV.

For the foregoing reasons, the petition for writ of mandamus will be denied.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Walter K. Stapleton
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1540

IN RE: JOANN PATENAUDE, et al.
Petitioners

On Petition For Writ Of Mandamus
from Order Denying Motion to Remand
of Judicial Panel on Multidistrict Litigation
(Related to D.C. No. MDL 875)

Argued January 28, 2000

Present: Greenberg, Roth, and Stapleton, *Circuit Judges.*

JUDGMENT

Upon consideration of the Petition for Writ of Mandamus, the Respondents' answers, and the briefs of the parties the arguments of counsel on January 28, 2000,

It is hereby ORDERED, ADJUDGED and DECREED by this Court that the prayer of petitioners is denied. Costs taxed against petitioners. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Acting Clerk

Dated: April 11, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1540

IN RE: JOANN PATENAUDE, et al.,

Petitioners

On Petition for Writ of Mandamus
from Order Denying Motion to Remand of the
Judicial Panel on Multidistrict Litigation
(Related to D.C. No. MDL 875)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, and SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ROTH, RENDELL, and STAPLETON, *Circuit Judges*

The petition for rehearing filed by the Petitioners in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the

petition for rehearing is denied. Judge Stapleton's vote is limited to denying rehearing before the original panel.

BY THE COURT:
/s/ Edward Becker
Circuit Judge

DATED: MAY 24 2000
DR/CC:SRB
JSM
AJT
JJR
RCD
JDA
ERG
RHR

November 21, 1990

Judicial Panel on Multidistrict Litigation
1120 Vermont Avenue, N.W., Suite 1002
Washington, D.C. 20005-3545

(Filed Jan. 17, 1991)

Attention: Robert Cahn

Gentlemen:

Asbestos personal injury litigation continues to be a serious problem for the federal judiciary. We are now in the third decade in some districts with these cases. There are approximately 30,000 cases pending and despite our best efforts, the courts continue to fall behind with no relief in sight.

We are persuaded that the problem is so large and the effort to solve it so onerous that the asbestos crisis should not be visited on one judge. It is clear, moreover, that any attempt at complete and fair resolution requires a concerted and national approach. We, therefore, request that the Panel on Multidistrict Litigation on its own initiative revisit the question of transferring all asbestos personal injury cases to a single district for coordinated or consolidated pretrial proceedings under 28 United States Code section 1407 and assign these cases to a group of judges with a presiding judge, with further provision being made to add additional judges in the future.

The undersigned judges recommend that Judge Charles Weiner be designated as presiding transferee judge. Judge Weiner has agreed to accept such a designation.

In our judgment, transfer of these cases will assist the courts in addressing the following goals:

1. It will permit a coordinated effort to determine which defendants, if any, have limited funds.

2. It will facilitate global settlements.

3. It will provide a mechanism for a uniform case management plan.

4. It will permit us to fully explore other national disposition techniques such as classes and sub-classes under Rule 23.

5. It will permit the workload to be spread among judges so that individual judges may separately direct their efforts to consolidated common issues or claims.

6. It will avoid the potential for inconsistent decisions from courts of appeals.

7. It will avoid inconsistent pretrial rulings.

There has been pending in the Eastern District of Texas *Linscomb, et al. v. Pittsburgh-Corning, et al.*, Civil Action No. 1:86-MC-456, wherein plaintiffs' counsel are seeking a national class action and assert that they collectively represent in excess of 50% of the cases pending in the country. Settlement negotiations have been ongoing in that case under the supervision of Special Master Francis McGovern.

In the event the panel looks favorably upon this request, it may be helpful for each of the undersigned judges to also be designated as transferee judges sitting in each of the 94 districts for this litigation.

Thank you for your early attention to this request.

/s/ Walter J. Gex, III cms
Walter J. Gex, III
United States District Judge
Southern District of Mississippi

/s/ Thomas D. Lambros cms
Thomas D. Lambros
Chief United States Dist. Judge
Northern District of Ohio

/s/ Alan H. Nevas cms
Alan H. Nevas
United States District Judge
District of Connecticut

/s/ Richard A. Schell cms
Richard A. Schell
United States District Judge
Eastern District of Texas

/s/ Charles Schwartz, Jr. cms
Charles Schwartz, Jr.
United States District Judge
Eastern District of Louisiana

/s/ Charles R. Weiner cms
Charles R. Weiner
United States District Judge
Eastern District of Pennsylvania

/s/ Charles R. Wolle
Charles R. Wolle
United States District Judge
Southern District of Iowa

/s/ Rya Zobel cms
Rya Zobel
United States District Judge
District of Massachusetts

DOCKET NO. 875

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

BEFORE JOHN F. NANGLE, CHAIRMAN, S. HUGH DILLIN, MILTON POLLACK, LOUIS H. POLLAK, HALBERT O. WOODWARD, ROBERT R. MERHIGE, JR., AND WILLIAM B. ENRIGHT, JUDGES OF THE PANEL.

ORDER TO SHOW CAUSE

The Panel has visited the asbestos litigation on five occasions beginning in 1977, and continuing in 1980, 1985, 1986 and 1987.[1] Each time the Panel has denied transfer under 28 U.S.C. §1407. In our 1977 decision we recited in detain the parties' contentions about how the actions differed, and we remain fully aware of the differences elucidated.[2] Even though these differences exist, however, the asbestos actions may still involve common questions of fact. We now choose to revisit the question of transfer under Section 1407 because, as this mammoth

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[1] *In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F.Supp. 906 (J.P.M.L. 1977); *In re Asbestos Products Liability Litigation (No. II)*, MDL-416 (J.P.M.L., March 13, 1980) (unpublished order); *In re Asbestos School Products Liability Litigation*, 606 F.Supp. 713 (J.P.M.L. 1985); *In re Ship Asbestos Products Liability Litigation*, MDL-676 (J.P.M.L., Feb. 4, 1986) (unpublished order); *In re Leon Blair Asbestos Products Liability Litigation*, MDL-702 (J.P.M.L., Feb. 6, 1987) (unpublished order).

[2] Thus, in response to this order, we do not want a regurgitation of the 1977 arguments from the parties.

litigation has become almost unmanageable in scope,[3] certain district judges have asked us to provide a means for centralized judicial management of common aspects of the constituent actions, while still preserving elements of localized judicial management.[4] Under the framework contemplated in this order, the Panel would accomplish these two ends by designating judges already assigned to asbestos actions as transferee judges assigned to the actions centralized in a single district. Hearings could be held in the transferee district when appropriate or in each judge's own district when appropriate.

All parties to actions pending and not in trial, as of January 17, 1991,[5] in any federal district court and involving allegations of personal injury or wrongful death

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[3] The Statistical Division of the Administrative Office of the United States Courts reports that as of September 30, 1990, about 31,500 actions were pending in federal judicial districts, with some in almost all districts, including the following largest concentrations, approximately: 5,200, E.D. Pa.; 4,500, N.D. Ohio; 3,300, E.D. Tex.; 2,800, D. Mass.; 1,600, S.D. Miss.; and 1,500, S.D.N.T. The Statistical Division further reports that in 1990, 13,809 actions were filed; that in 1989, 8,987 actions were filed, and that the filing rate far exceeds the disposition rate.

[4] The district judges who have asked us to revisit the question of Section 1407 transfer include Judges Gex, S.D. Misc.; Lambros, M.D. Ohio; Nevas, D. Conn.; Schell, E.D. Tex.; Schwartz, E.D. La.; Weiner, E.D. Pa.; Weinstein, E.D.N.T.; Wolle, S.D. Iowa; and Zobel, D. Mass. These judges are experienced in asbestos litigation and have been admirably attempting to coordinate their efforts.

[5] If the Panel orders transfer in this litigation, all actions filed after the filing date of this order will be treated as potential tag-along actions. *See* Panel Rules 12 and 13, R.P.J.P.M.L., 120 F.R.D. 251, 258-59 (1988).

caused by asbestos are hereby ordered to show cause why all those actions should not be transferred to a single district for coordinated or consolidated pretrial proceedings under 28 U.S.C. §1407 and assigned to a group of United States district judges, most sitting by intracircuit assignment under 28 U.S.C. §292(b) or intercircuit assignment under 28 U.S.C. §292(d). One judge would be designated as presiding transferee judge, while the others would be assistant transferee judges. All these judges would sit as judges of the transferee district even when they hold hearings in their own districts for the overall convenience of the parties, witnesses, counsel and themselves.

Our goals here are to utilize Section 1407 in order to streamline the common questions in this litigation to the greatest extent possible; to eliminate duplication and overlap; to encourage a uniform case management plan; to allow for division of responsibility among the assigned judges; to provide a mechanism of the transferee judges to fully explore the uniform use of dispositive techniques (such as (a) classes and subclasses under Fed.R.Civ.P. Rule 23, (b) pleural registries; (c) separately consolidated pretrial or trial on any common issues or claims; and (d) separated reverse trials on various issues); to avoid inconsistent rulings; to facilitate settlement; to focus the circuit appellate process regarding centralized rulings; to provide a method whereby repetition in newly filed actions is eliminated; to provide a focal point to facilitate coordination with the mammoth number of asbestos

actions pending in state courts;[6] and, most importantly, to better implement Fed.R.Civ.P. Rule 1's edict to secure the just, speedy and inexpensive determination of federal litigation. Matters unique to any actions or subgroups of actions could proceed concurrently with any centralized efforts.

IDENTITY OF ACTIONS EMBRACED BY THIS ORDER

Because of the difficulty in identifying such a large number of actions, we request that the chief judges of all district courts assist us by determining, by February 15, 1991, which actions pending and not in trial in their districts as of January 17, 1991, involve allegations of personal injury or wrongful death caused by asbestos. Such actions are hereby embraced by this order.

SERVICE OF THIS ORDER ON ALL PARTIES TO ACTIONS EMBRACED BY THIS ORDER

Because of the difficulty in serving this order on such a large number of parties, we request that the clerks of all district courts assist us by photocopying and mailing, by February 15, 1991, a copy of this order to all parties to all actions in their districts embraced by this order as determined by their chief judges. If asbestos liaison counsel, lead counsel or coordinating counsel have been appointed in any districts, we encourage their use for this

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[6] Approximately 60,000 actions are said to be pending in state courts.

purpose.[7] We further request that the clerks of all district courts provide to the Clerk of the Panel a list of these actions with the following information: caption, docket number, assigned judge, plaintiffs' and defendants' names, their counsels' names and addresses, addresses of any parties unrepresented by counsel, unknown addresses so stated, and unserved defendants specifically noted.[8] Instead of providing us with the name and address of each party's own counsel, the name and address of any liaison counsel, lead counsel or coordinating counsel, if one has been appointed by a district court, is preferable.

WRITTEN RESPONSES OF THE PARTIES TO THIS ORDER

Any party to these actions may submit an original response, with eleven copies, to this order to the Clerk of the Panel no later than March 18, 1991.[9] Responses to this order shall comply with the Panel's Rules of Procedure, found at 120 F.R.D. 251 (1988), unless otherwise specified in this order.[10] No party may submit more than one response and one reply. Use of lead counsel, coordinating

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[7] *See Manual for Complex Litigation, Second*, § 20.22 (1988).

[8] It may be possible to provide this information in automated format upon consultation with the Clerk of the Panel.

[9] The address of the Clerk of the Panel for this docket is Asbestos Litigation Clerk, Judicial Panel on Multidistrict Litigation, 1120 Vermont Ave., N.W., Suite 1002, Washington, D.C. 20005.

[10] All responses and replies shall be organized as specified in the appendix to this order.

counsel and joint responses is strongly encouraged. Counsel are directed to confer with each other for the purpose of submitting joint responses without duplication.[11]

REPLIES TO RESPONSES

Any party may submit an original reply limited to new matters to the Clerk of the Panel with eleven copies no later than April 2, 1991. Joint replies are strongly encouraged.

FILING AND SERVICE OF RESPONSES AND REPLIES

All responses to this order and replies shall be filed and served in conformity with Panel Rules 3, 4, 5, 6, 7 and 9, *supra*, 120 F.R.D. at 253-56, except as specified hereafter. Rule 8, *id.* at 254-55, is hereby suspended for the purposes of this order. In addition to submitting original responses and replies, with eleven copies of each, to the clerk of the Panel, the only other service required of responses and replies is two copies to the designee in each circuit as listed in the appendix to this order. Responses and replies on file with each circuit designee shall then compose a regional pleading depository, functioning like a

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[11] For example, we understand that a plaintiffs' counsel steering committee has been designated in the Eastern District of Texas and that this committee asserts that it represents plaintiffs in more than half of the asbestos actions.

document depository, to enable all other interested parties to review the pleadings.[12]

EFFECT OF THIS ORDER ON PENDING ACTIONS

The pendency of this order before the Panel does not stay or otherwise affect proceedings in the district courts in any of the constituent actions, nor does this order limit the jurisdiction of those courts in any way. Panel Rule 18, *supra*, 120 F.R.D. at 263.

HEARING ON THIS ORDER

It is ordered that on Thursday, May 30, 1991, a hearing on this order will begin at 10 a.m. in Courtroom 506, Fifth Floor, U.S. Courthouse, Foley Square, New York, New York.

It is further ordered that at said hearing the Panel will consider transfer of any or all of the actions embraced by this order to any district or districts.

Counsel presenting oral argument must be present at 9 a.m. on the morning of the hearing to determine the

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[12] Service on all other parties in all actions embraced by this order would be too costly and too burdensome. The purpose of each regional pleading depository is to provide a place in each circuit where interested parties may review other parties' responses, replies and hearing appearances. The responsibility of each circuit designee is simply to make these materials available for on site review. No party shall remove these materials from control of a circuit designee. The circuit designees are not expected to photocopy these materials for anyone. Other reasonable guidelines for review are within the discretion of each circuit designee.

amount of time allotted to each for oral argument. Brevity is encouraged. The attached "Notice of Presentation or Waiver of Oral Argument" must be filed with the Clerk of the Panel no later than April 15, 1991. In order to permit review by all interested parties, two copies of this notice must be served on the designee for each circuit as listed in the appendix to this order. No other service is required.

Hearings are governed by Panel Rules 16 and 17, *supra*, 120 F.R.D. at 261-62. Counsel with like positions are directed to confer prior to the hearing for the purpose of selecting a spokesperson and organizing their arguments to avoid duplication. Parties are encouraged to waive oral argument and thereby present their positions to the Panel fully on the basis of their own written responses or those submitted on their behalf through liaison counsel, lead counsel or coordinated counsel.

FOR THE PANEL:

/s/ John F. Nangle
Judge John F. Nangle
Chairman

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)	)	CIVIL ACTION NO. MDL 875 (INCLUDING MARDOC, FELA, and TIREWORKER cases)
This Document Relates to: ALL ACTIONS	)	

ADMINISTRATIVE ORDER NO. 3

* * *

If no request for referral is made and the parties have been unable to resolve their differences, the Court shall determine whether the matter is appropriate for immediate remand of the plaintiff's compensatory damages claims. The issue of punitive damages must be resolved at a further date with regard to the entire MDL action, and therefore any claims for punitive or exemplary damages will be severed from such cases and retained by the Court within its jurisdiction over MDL 875 in the Eastern District of Pennsylvania.

* * *

FILED APR 16, 1993
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. CARLOUGH; PAVLOS KEKRIDES and NAPSSICA KEKRIDES, his wife; LAVERNE WINBUN, Executrix of the Estate of JOSEPH E. WINBUN, deceased; AMBROS VOGT, JR. and JOANNE VOGT, his wife; CARLOS RAVER and DOROTHY M. RAVER, his wife; JOHN A. BAUMGARTNER and ANNA MARIE BAUMGARTNER, his wife; TIMOTHY MURPHY and GAY MURPHY, his wife; TY T. ANNAS; and FRED ANGUS SYLVESTER,	:	CA. NO. 93-215
ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED	:	
V.	:	
AMCHEM PRODUCTS, INC. ET AL	:	

WEINER, J. April 15 1993

MEMORANDUM OPINION AND ORDER

* * *

Judicial objectives

Throughout the course of the multidistrict litigation, the court has maintained several overriding objectives. Foremost, it is this court's considered judicial opinion that the sick and the dying, their widows and survivors should have their claims addressed first. Accordingly, the court steadfastly resisted motions to remand cases back to transferor courts unless the claimant was seriously ill or dying and all avenues of settlement were exhausted. In hardship circumstances, the court requested that the remand result in an early trial setting. The court advised counsel that motions to remand involving other circumstances would only serve to deplete resources otherwise available for settlements and thus would be routinely denied. This philosophy has also guided the court in conducting settlement negotiations.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
(ATLANTA DIVISION)

RUSSELL D. BENNETT AND CATHY BENNETT,	CIVIL ACTION NO. 1:89-CV-1677-RLV
WILLIAM C. BLACKWELL AND RUTH WEAVER BLACKWELL,	CIVIL ACTION NO. 1:91-CV-0643-RLV
HENRY J. BRANTON AND CAROLINE BURRIS BRANTON,	CIVIL ACTION NO. 1:91-CV-0647-RLV
ELLIS H. CHRISTIAN,	CIVIL ACTION NO. 1:89-CV-1504-RLV
ROBERT F. COX, SR.,	CIVIL ACTION NO. 1:89-CV-1584-RLV
BILLY B. SANDERS,	CIVIL ACTION NO. 1:89-CV-1578-RLV
TONY ALFORD WATKINS,	CIVIL ACTION NO. 1:91-CV-0646-RLV
THOMAS L. YATES,	CIVIL ACTION NO. 1:87-CV-1328-RLV
Plaintiffs,	
vs.	
THE CELOTEX CORPORATION, ET AL.,	
Defendants.	

AFFIDAVIT OF STEVEN D. WOLENS

STATE OF TEXAS §
§
COUNTY OF DALLAS §

On this day STEVEN D. WOLENS appeared before me and stated the following:

1. My name is Steven D. Wolens. I am over the age of 21 years, of sound mind, and have personal knowledge of the facts stated herein.

2. I am a shareholder in the professional law corporation of Baron & Budd, P.C. and I represent Plaintiffs, Russell D. Bennett and Cathy Bennett, William C. Blackwell and Ruth Weaver Blackwell, Henry J. Branton and Caroline Burris Branton, Ellis H. Christian, Robert F. Cox, Sr., Billy B. Sanders, Tony Alford Watkins, and Thomas L. Yates, who are all seeking remand of their claims to the originating court of the Northern District of Georgia, Atlanta Division.

3. I firmly believe that each of these Plaintiffs' cases is currently ripe for trial. Each of the Plaintiffs has fully complied with this Court's directions regarding provision of information to Defendants and/or to the Court, and I have attempted in good faith to settle their cases. On December 2nd, 1997, Plaintiffs' claims were the subject of a settlement conference conducted with the Defendants who are members of the Center for Claims Resolution. Neither that settlement conference nor other discussions with counsel for other Defendants have generated *any* monetary offer to settle Plaintiffs' cases, much less generated offers approaching historical values for their claims.

4. On March 12, 1998, each of these Plaintiffs provided supplemental interrogatory responses to all Defendants, including updated information regarding Plaintiffs' work histories and exposures to Defendants' asbestos-containing products, and any new information

regarding their medical status. Defendants have conducted depositions regarding each of the Plaintiffs and have received all relevant medical records.

FURTHER AFFIANT SAYETH NOT.

/s/ Steven D. Wolens
STEVEN D. WOLENS

SWORN TO AND SUBSCRIBED before me on this the 29th day of April, 1998.

/s/ Rhonda L. Weiche
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

My Commission Expires:

[SEAL] RHONDA L. WEICHE
Notary Public
STATE OF TEXAS
My Comm. Exp. 07/14/99

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY	:	
LITIGATION (NO. VI)	:	CIVIL ACTION
This Document Relates to:	:	NO. MDL 875

AFFIDAVIT OF FREDERICK M. BARON

STATE OF TEXAS §
§
COUNTY OF DALLAS §

On this day FREDERICK M. BARON appeared before me and stated the following:

1. My name is Frederick M. Baron. I am over the age of 21 years, of sound mind, and have personal knowledge of the facts stated herein.

2. I am a shareholder in the professional law corporation of Baron & Budd, P.C. and both me and my law firm have spent much of the past 25 years representing victims of asbestos-related injuries. Today, Baron & Budd, P.C. represents several thousand such victims, including hundreds of plaintiffs whose federal court actions have been transferred to MDL 875.

3. In 1991, upon creation of MDL 875, I was appointed as a member of the Plaintiffs' Steering Committee ("PSC") in that proceeding, and I continue to be a member of the PSC today. In that capacity, and as Chair of the Legal Issues sub-committee of the PSC, I have attended most meetings of the PSC since its inception, and I have

received all correspondence, memoranda, and pleadings filed by the PSC.

4. During the seven-year pendency of MDL 875, no common or global discovery has been sought or conducted by either Plaintiffs or Defendants in this action, and no common questions of law or fact have been the subject of global resolution by this Court. Since late 1991, there have been no efforts by Plaintiffs or Defendants to negotiate any type of "global" resolution or settlement of all parties' claims in MDL 875. In fact, so little global or common activity has taken place in MDL 875 that, since 1993, the PSC has been completely inactive on all fronts: there have been no meetings or other activities by the PSC during the past four years.

5. Since 1991, the only activity in MDL 875 of which I have been aware has related either to the class action case of *Georgine v. Amchem Products*, or has related to the individual circumstances and claims of particular asbestos claimants (or, more accurately, groups of such claimants represented by the same counsel). Since 1991, any discovery, settlement, or other litigation activity in MDL 875 has been limited to such individual claims or groups of claims.

FURTHER AFFIANT SAYETH NOT.

/s/ Frederick M. Baron
FREDERICK M. BARON

SWORN TO AND SUBSCRIBED before me on this the 14th day of Sept., 1998.

/s/ Jan G. Thompson
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

[SEAL] JAN G. THOMPSON
NOTARY PUBLIC
State of Texas
Comm. Exp. 02-28-2002

My Commission Expires:
2/26/2002

DOCKET NO. 875

(Filed May 20, 1998)

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

BEFORE JOHN F. NANGLE, CHAIRMAN, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS,* AND LOUIS C. BECHTLE, JUDGES OF THE PANEL*

ORDER DENYING REMAND

Plaintiffs in the 67 actions listed on the attached Schedule A move the Panel, pursuant to Rule 14, R.P.J.P.M.L., 147 F.R.D. 589, 597-99 (1993), for remand of their actions from the Eastern District of Pennsylvania to the District of Oregon. Defendants Asbestos Corp., Ltd., and Pittsburgh Corning Corp. oppose the remand motion.

On the basis of the papers filed and the hearing held, the Panel finds that remand is not appropriate at this time for these actions. The following quotation from an earlier Panel opinion is very instructive for situations such as this, where no recommendation of remand has been transmitted to the Panel from the transferee judge:

> The Panel's Rules of Procedure provide that the Panel shall consider the question of remand on the motion of any party, on the suggestion of the transferee court or on the Panel's own initiative. Rule [14(c)], R.P.J.P.M.L., [147] F.R.D. [589,

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* Judges Merhige and Sanders recused themselves and took no part in the decision of this matter.

> 597-98 (1993)]. In considering the question of remand, the Panel has consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings. *See, e.g., In re IBM Peripheral EDP Devices Antitrust Litigation*, 407 F.Supp. 254, 256 (J.P.M.L. 1976). The transferee judge's notice of suggestion of remand to the Panel is obviously an indication that he perceives his role under Section 1407 to have ended. *In re Air Crash Disaster Near Dayton, Ohio, on March 9, 1967*, 386 F.Supp. 908, 909 (J.P.M.L. 1975). Absent a notice of suggestion of remand from the transferee judge to the Panel, any party advocating remand before the Panel bears a strong burden of persuasion. We rule that movants have not met this burden here and that the motion for remand is premature.

In re Holiday Magic Securities and Antitrust Litigation, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977). Judge Weiner has become thoroughly familiar with the issues in MDL-875 and, especially in light of the unprecedented scale of this docket, is in the best position to determine the future course of actions before him. We note that under Judge Weiner's stewardship, as of May 5, 1998, i) 53,687 actions have been closed in the transferee district, and ii) 976 actions or claims therein (including 29 from the District of Oregon) have been returned to their originating transferor districts.

Accordingly, we find that the moving plaintiffs have failed both i) to persuade Judge Weiner of the desirability of remand (as evidenced by his continuing decision to

defer ruling upon plaintiffs' request for a suggestion of remand to the Panel), and ii) to offer the Panel a valid reason why it should order remand in the absence of a suggestion from Judge Weiner. Accordingly, we will deny remand.

IT IS THEREFORE ORDERED that the motion for remand be, and the same hereby is, DENIED.

FOR THE PANEL:

/s/ John F. Nangle
John F. Nangle
Chairman

MDL-875 – In re Asbestos Products Liability Litigation (No. VI)

Eastern District of Pennsylvania

Frank Foley et al. v. Armstrong Cork Co. et al., (D. Oregon, C.A. No. 3:89-1407)
George Wood v. Acands, Inc., et al., (D. Oregon, C.A. No. 3:90-131)
Robert Maley v. Asbestos Corp., Ltd. et al., (D. Oregon, C.A. No. 3:90-839)
William Jimenez v. Acands, Inc., et al., (D. Oregon, C.A. No. 3:90-879)
Winifred Bohna v. Acands, Inc., et al., (D. Oregon, C.A. No. 3:90-929)
Kathleen L. Bradley v. Asbestos Corp., Ltd. et al., (D. Oregon, C.A. No. 3:90-1314)
Lyle Burgess v. Acands, Inc., (D. Oregon, C.A. No. 3:91-141)

Viola B. Jones v. Asbestos Corp., Ltd., (D. Oregon, C.A. No. 3:91-365)

Aldo Baldisseri v. Armstrong Cork Co., (D. Oregon, C.A. No. 3:91-485)

Diane Mathers v. Acands, Inc., (D. Oregon, C.A. No. 3:91-528)

Jerry Horn v. Acands, Inc., et al., (D. Oregon, C.A. No. 3:92-159)

Kenneth T. Lamear v. Armstrong World Industries, Inc., et al., (D. Oregon, C.A. No. 3:92-839)

Jack Beeson v. Columbia I And S Inc., et al., (D. Oregon, C.A. No. 3:92-900)

John A. Roberts v. Acands, Inc., et al., (D. Oregon, C.A. No. 3:92-1202)

Elmer E. Downing, Jr. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:92-1582)

Hazel Evans v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:92-1606)

Garry D. Lynch v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-19)

Lucia C. Holt v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-20)

Charles Ziesler v. Armstrong World Industries, Inc., et al., (D. Oregon, C.A. No. 3:94-71)

Everal A. Housley v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:94-131)

Donna Lee Melhorn, etc. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-147)

Earl C. Baumgardner v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:94-382)

Will Hill Carter v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-391)

Tilford Aanderud v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:94-438)

Gordon Winn v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-556)

Jean V. Tapp v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:94-568)

Arthur Johansen v. Armstrong World Industries, Inc., et al., (D. Oregon, C.A. No. 3:94-679)

George A. Lee v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-924)

Walter R. Sandberg, etc. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-976)

H. Philip Eder, etc. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:94-1226)

Margaret K. Rogers v. A.P. Green Refractories Co., et al., (D. Oregon, C.A. No. 3:94-1236)

Fern Greenhalgh, etc. v. A.P. Green Refractories Co., et al., (D. Oregon, C.A. No. 3:94-1351)

Michael Bradley, etc. v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:94-1525)

Loretta M. Smith, etc v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:95-55)

Wayne McArthur v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:95-156)

Helen Carlson, etc. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:95-326)

Leota Olsen, etc. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:95-721)

Harold R. Wilson v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:95-953)

Archie Wade Horri v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-965)

William G. Klock, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1028)

Michael Vandenburgh v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1233)

George Weller Probasco, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1289)

Faye Y. Carlson, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1337)

Billye Hicks, etc. v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:95-1472)

Joseph R. Headley v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1543)

James E. Lyons, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1613)

W. Kirk Braun v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1614)

Neal McCaslin v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1615)

John McLeod v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1616)

Jane Leonaitis, etc. v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:95-1617)

Roy P. Barnes v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1618)

Harold Wilson, Jr., etc. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:95-1627)

Gerald Swanson, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1628)

Mary Dudley, etc. v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:95-1629)

Opal Williams v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1630)

Stanley S. Betty v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1631)

Audrey Coady, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:95-1898)

Keena Spence, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:96-54)

Patricia Ann McClinton, etc. v. A.W. Chesterton Co., et al., (D. Oregon, C.A. No. 3:96-59)

Timothy Graham v. Asbestos Corp., Ltd., et al., (D. Oregon, C.A. No. 3:96-116)

Leonard Pardue v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:96-256)

Earnest Morris Jauron v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:96-270)

June Z. Ehman, etc. v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:96-586)

Richard D. Hein, etc. v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:96-617)

Mae Williams v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:96-789)

Gladys Linne v. ACandS, Inc., et al., (D. Oregon, C.A. No. 3:96-1400)

Edward Kramer v. Anchor Packing Co., et al., (D. Oregon, C.A. No. 3:96-1471)

MARTHA J. WHITTEN, as Personal Representative of the Heirs and Estate of JAMES A. WHITTEN, Deceased THOMAS L. YATES Plaintiffs, vs. THE CELOTEX CORPORATION, ET AL., Defendants.	CIVIL ACTION NO. 1:89-CV-1577-RLV CIVIL ACTION NO. 1:87-CV-1328-RLV

AFFIDAVIT OF STEVEN D. WOLENS

STATE OF TEXAS §
§
COUNTY OF DALLAS §

On this day STEVEN D. WOLENS appeared before me and stated the following:

1. My name is Steven D. Wolens. I am over the age of 21 years, of sound mind, and have personal knowledge of the facts stated herein.

2. I am a shareholder in the professional law corporation of Baron & Budd, P.C. and I represent the 44 above-named Plaintiffs, who are all seeking remand of their claims to the originating court of the Northern District of Georgia, Atlanta Division.

3. I firmly believe that each of these Plaintiffs' cases is currently ripe for trial. Each of the Plaintiffs has fully

complied with the transferee court's directions regarding provision of information to Defendants and/or to the Court, and I have attempted in good faith to settle their cases. On December 2, 1997 and July 14, 1998 these Plaintiffs' claims were the subject of settlement conferences conducted by the transferee court. Both during the interim between those conferences and subsequently, numerous settlement discussions with respect to these cases have taken place between my office and defense counsel. With the exception of settlements of a few plaintiffs' cases with a single, minor defendant – Combustion Engineering, Inc. – all such settlement discussions have proven unfruitful. In many instances, Defendants have failed to generate *any* monetary offer to settle Plaintiffs' cases. And in all cases, Defendants have failed to offer settlement amounts that approach historical settlement values for similar claims.

4. On March 12, 1998, each of these Plaintiffs provided supplemental interrogatory responses to all Defendants, including updated information regarding Plaintiffs' work history and exposures to Defendants' asbestos-containing products, and any new information regarding their medical status. Defendants have received all relevant medical records and expert medical reports with respect to all of the Plaintiffs' claims. Plaintiffs have complied with all pre-trial orders issued by the transferee court.

5. On April 29 and May 5, 1998, Plaintiffs filed Motions to Suggest Remand with the transferee court. To date, despite the parties' inability to resolve these cases, the undisputed ripeness of such cases for trial, and the completion of all consolidated and coordinated pretrial

proceeding in MDL 875, the transferee court has failed to act on Plaintiffs' motions. True and correct copies of Plaintiffs' Motions to Suggest Remand are attached to this affidavit and incorporated herein by reference.

FURTHER AFFIANT SAYETH NOT.

/s/ Steven D. Wolens
STEVEN D. WOLENS

SWORN TO AND SUBSCRIBED before me on this the 23rd day of September, 1998.

/s/ Rhonda L. Weiche
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

My Commission Expires:

[SEAL] RHONDA L. WEICHE
Notary Public
STATE OF TEXAS
My Comm. Exp. 07/14/99

DOCKET NO. 875

(Filed Feb. 5, 1999)

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

BEFORE JOHN F. NANGLE, CHAIRMAN, WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS, LOUIS C. BECHTLE AND JOHN F. KEENAN, JUDGES OF THE PANEL

ORDER DENYING REMAND

Before the Panel are two motions for remand brought, pursuant to Rule 7.6, R.P.J.P.M.L. 181 F.R.D. 1, 11-13 (1998), by i) plaintiffs in the 44 actions listed on Schedule A and previously transferred from the Northern District of Georgia seeking remand of those actions to the Northern District of Georgia, and ii) certain plaintiffs in the six actions listed on Schedule A and previously transferred from the Northern District of New York seeking remand of those actions to the Northern District of New York.

On the basis of the papers filed and the hearing held, the Panel finds that remand of the actions is not appropriate at this time. The following quotation from an earlier Panel opinion is very instructive for situations such as this, where no recommendation of remand has been made to the Panel by the transferee judge:

> The Panel's Rules of Procedure provides that the Panel shall consider the question of

> remand on the motion of any party, on the suggestion of the transferee court or on the Panel's own initiative. Rule [7.69c)], R.P.J.P.M.L. [181] F.R.D. [1, 12 (1998)]. In considering the question of remand, the Panel has consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings. *See, e.g., In re IBM Peripheral EDP Devices Antitrust Litigation*, 407 F.Supp. 254, 256 (J.P.M.L. 1976). The transferee judge's notice of suggestion of remand to the Panel is obviously an indication that he perceives his role under section 1407 to have ended. *In re Air Crash Disaster Near Dayton, Ohio, on March 9, 1967*, 386 F.Supp. 908, 909 (J.P.M.L. 1975). Absent a notice of suggestion of remand from the transferee judge to the Panel, any party advocating remand before the Panel bears a strong burden of persuasion. We rule that movants have not met this burden here and that the motion for remand is premature.

In re Holiday Magic Securities and Antitrust Litigation, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977).

We reiterate that Judge Weiner has become thoroughly familiar with the issues in MDL-875 and, especially in light of the unprecedented scale of this docket, is in the best position to determine the future course of the actions before him. We note that under Judge Weiner's stewardship, as of January 31, 1999, i) nearly 60,000 actions have been closed in the transferee district, and ii) nearly 1,000 actions or claims therein (including 15 from the Northern District of New York and three from the Northern District of Georgia) have been returned to their

originating transferor districts. The wisdom of relying on Judge Weiner's determination that pretrial proceedings have run their course is particularly evidenced by the circumstances of the motions now before the Panel. Subsequent to the filing of plaintiffs' requests to Judge Weiner for suggestions of remand in the spring of 1998. Judge Weiner has continued to hold settlement conferences in the various actions, some as recently as a few days before the Panel's hearing on the remand motions. Such a scenario illustrates why the Panel is reluctant to rely solely on the conclusions of parties to an action when determining whether remand is appropriate. We find that the moving parties have failed both i) to persuade Judge Weiner of the desirability of remand, and ii) to offer the Panel a valid reason why it should order remand in the absence of a suggestion from Judge Weiner. Accordingly, we will deny remand.

IT IS THEREFORE ORDERED that the motions for Section 1407 remand of the actions on the attached Schedule A be, and the same hereby are, DENIED.

FOR THE PANEL:

/s/ John F. Nangle
John F. Nangle
Chairman

SCHEDULE A

MDL-875 – In re Asbestos Products Liability Litigation (No. VI)

Eastern District of Pennsylvania

Walter H. Cain, Jr. v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:87-1303)

Thomas Yates v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:87-1328)

Yancey Payne v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1063)

James Crews v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1064)

Walter White v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1111)

Dennis R. Holland v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1333)

Emma C. Fannin v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1334)

Ellis H. Christian v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1504)

Edward L. Brantley v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1505)

Albert N. Bradley v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1506)

John Royster v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1507)

Barry F. Gilbert v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1508)

Claud G. Langley v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1564)

Harold W. Ross v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1565)

David Strickland v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1566)

Thomas J. Lee v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1567)

Andy A. Launiere v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1568)

John O. Bassett v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1569)

Marion A. Davis v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1570)

Daniel M. Denson v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1571)

George T. Clement v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1572)

Thomas Coalson v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1573)

Martha J. Whitten v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1577)

Billy B. Sanders v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1578)

Richard H. Ringwall v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1579)

Russell R. Smith v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1580)

Gordon Davis v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1581)

Claude C. Evans v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1582)

Delores Christian v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1583)

Robert F. Cox v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1584)

Jane F. Clackum v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1585)

David W. Barrett v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1586)

Russell D. Bennett v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1677)

J.D. Hudspeth v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1759)

John Robert Tidwell v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1784)

Max E. Ennis v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-1840)

Ruby K. Gaddis v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:89-2141)

Everett C. Beecham v. Celotex Corporation, et al. (N.D. Georgia, C.A. No. 1:90-810)

Charles Hubert Brown, et al. v. Armstrong Cork Co, et al. (N.D. Georgia, C.A. No. 1:91-642)

William C. Blackwell, et al. v. Owens-Corning, et al. (N.D. Georgia, C.A. No. 1:91-643)

Walter E. Watson v. Owens-Corning, et al. (N.D. Georgia, C.A. No. 1:91-644)

John B. Ingle, et al. v. Owens-Corning, et al. (N.D. Georgia, C.A. No. 1:91-645)

Tony Alford Watkins v. Armstrong Cork Co., et al. (N.D. Georgia, C.A. No. 1:91-646)

Henry J. Branton, et al. v. Owens-Corning, et al. (N.D. Georgia, C.A. No. 1:91-647)

Joanne L. Patenaude v. Armstrong World Industries Inc. (N.D. New York, C.A. No. 1:87-871)

Frank Dinapoli, et al. v. Carey Canada Inc., et al. (N.D. New York, C.A. No. 1:87-874)

Anthony J. Perta, et al. v. Flintkote Co., et al. (N.D. New York, C.A. No. 1:87-1021)

Stella Fellows, et al. v. Carey Canada Inc., et al. (N.D. New York, C.A. No. 1:87-1111)

Walter Kowal, et al. v. Rutland Fire Clay Co., et al. (N.D. New York, C.A. No. 1:89-1379)

Alice M. Pandori v. Armstrong World Industries, Inc. (N.D. New York, C.A. No. 1:91-436)

IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

IN RE: JOANN PATENAUDE, *ET AL.*,	§	No. 99-___
Petitioners	§	

SUPPLEMENTAL AFFIDAVIT OF STEVEN D. WOLENS

STATE OF TEXAS

COUNTY OF DALLAS

On this day STEVEN D. WOLENS appeared before me and stated the following:

1. My name is Steven D. Wolens. I am over the age of 21 years, of sound mind, and have personal knowledge of the facts stated herein.

2. I am a shareholder in the professional law corporation of Baron & Budd, P.C. and I represent the Georgia Petitioners and the New York Petitioners in this action, who are seeking a writ of mandamus from this Court directing that the Judicial Panel on Multidistrict Litigation remand their cases to the transferor district courts.

3. The New York Petitioners are 88 plaintiffs who originally filed their asbestos-related personal injury lawsuits in the Northern District of New York between 1987 and 1991. Those Petitioners' injuries range from the invariably fatal cancer mesothelioma, for which asbestos is the only known cause, to pleural disease, a non-malignant scarring of the lining of the lung from asbestos exposure. Of the New York Petitioners, 4 were victims of

mesothelioma, 19 had asbestos-related lung cancer, 7 had other forms of asbestos-related cancer, 31 had asbestosis, 3 had pleural disease, and 26 are spouses with claims for loss of consortium. At least 23 of the New York Petitioners have died as a result of asbestos-related injuries, including four who have died during the seven and a half year period since their cases were transferred to MDL 875. In addition to the four New York Petitioners who have died directly from asbestos-related conditions during the pendency of MDL 875, another six of the New York Petitioners have died (either from their asbestos injury or other causes) during that same period of time.

4. The stories of these victims are tragic, and the damages they have suffered are tremendous. Petitioner Joann Patenaude lost her husband Robert to mesothelioma when he was only 46 years old. Although Joann was approximately 80 percent dependent on her husband's income at the time of his death in 1983, she has struggled on her own for the intervening 15 years, having lost both a husband and the source of her financial security. Robert Patenaude's lost wages as a result of his asbestos-related cancer are approximately $590,000. Similarly, Pauline Edwards lost her husband George LaClaire to asbestos-related lung cancer in 1986 when George was only 40 years old. George LaClaire's lost wages are approximately $728,000. And Margaret Durr lost her husband Thomas to mesothelioma when he was 60.

5. The Georgia Petitioners are 61 plaintiffs who filed their asbestos-related personal injury and death claims in the Northern District of Georgia between 1987 and 1991.

Three of the Georgia Petitioners suffered from mesothelioma, three were victims of asbestos-related lung cancer, 50 have asbestosis, and four are spouses who have claims for loss of consortium. Twenty of the Georgia Petitioners have died as a result of their asbestos-related injuries, including fourteen who have died since their cases were transferred to MDL 875. Their stories are quite similar to those of the New York Petitioners, and equally tragic.

6. All of the New York Petitioners and Georgia Petitioners have fully complied with the transferee court's directions regarding provision of information to Defendants and to the Court, and I have attempted in good faith to settle their cases. These Plaintiffs's claims have been the subject of numerous settlement conferences conducted by the transferee court. Both during the interim between those conferences and subsequently, numerous settlement discussions with respect to these cases have taken place between my office and defense counsel. I have travelled to Philadelphia for numerous conferences I have participated in numerous telephone conferences; I have had many direct phone calls with defense counsel and claims representatives in an attempt to resolve these cases. With the exception of settlements of some plaintiffs' cases with some defendants, the settlement discussions have not resolved the cases. In many instances, Defendants have failed to generate *any* monetary offer to settle Plaintiffs' cases; and in remaining cases, the Defendants have failed to offer settlement amounts that approach historical settlement values for similar claims.

7. In early 1998, all of these Petitioners provided supplemental interrogatory responses to all Defendants,

including updated information regarding their work history and exposures to Defendants' asbestos-containing products, and any new information regarding their medical status. Defendants have received all relevant medical records and expert medical reports with respect to all of the Petitioners' claims. Petitioners have complied with all pre-trial orders issued by the transferee court. To date, despite the parties' inability to resolve these cases and the completion of all consolidated and coordinated pretrial proceedings in MDL 875, the transferee court has failed to act on Plaintiffs' motions. Having failed to secure a ruling from the transferee court, in the fall of 1998 Petitioners filed motions to remand with the Judicial Panel on Multidistrict Litigation. Those motions were denied on February 5, 1999.

FURTHER AFFIANT SAYETH NOT.

/s/ Steven D. Wolens
STEVEN G. WOLENS

SWORN TO AND SUBSCRIBED before me on this the 9th day of June, 1999.

[SEAL] KATHY FISHER WALLACE
Notary Public, State of Texas
My Commission Expires:
May 16, 2003

/s/ Kathy Fisher Wallace
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission Expires:

5-16-2003

[June 12, 1999]

JEFFREY S. MUTNICK, OSB#72178
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Of Attorneys for Plaintiff

BEFORE THE
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

DOCKET NO. 875
IN RE ASBESTOS PRODUCTS
LIABILITY LITIGATION (NO. VI)

CIVIL ACTION NO. MDL 875

AFFIDAVIT OF JEFFREY S. MUTNICK

STATE OF OREGON)

) ss

County of Multnomah)

I, Jeffrey S. Mutnick, having been duly sworn, do hereby depose and say:

I represent the plaintiffs set forth in Exhibit One.

(A) Over a period of approximately seven years, I have filed at least six Motions for Remand to Judge Weiner. Movant has repeatedly suggested remand from the transferee court in accordance with Multidistrict Litigation Panel Rule 14(d).

(B) All common discovery and pretrial proceeding are complete in these cases.

(C) There are no orders of the transferee court with which plaintiffs have not fully complied.

Counsel for plaintiffs has repeatedly noted for the Court's benefit that, had these cases been remanded to the local district, they would have long been resolved. The average length of time, prior to the establishment of MDL 875, for a resolution of an Oregon case was less than one year. Since MDL 875, the average undoubtedly exceeds five years.

The remaining cases consist of malignancies and non-malignancies. The Court in the Eastern District of Pennsylvania has continually refused to remand these cases despite the fact that the jurisdiction granted the Court pursuant to the Multidistrict Litigation Order has long since lapsed.

Settlement conferences were held in December of 1995 and November of 1996 in Philadelphia.

After the November 1996 conference, counsel for plaintiffs was directed to exchange information with defendants Owens-Corning Fiberglas [sic] and E.J. Bartells. Plaintiff's counsel also attempted to contact all defendants to negotiate independently to little avail.

On May 30, 1997, I filed a Motion to Remand in the United States District Court for the Eastern District of Pennsylvania. I received no response.

In May of 1998, plaintiff's counsel appeared before the Multidistrict Litigation Panel. Plaintiff's counsel requested for the reasons noted above, that the cases listed on Exhibit One be returned to the transferor court.

After some delay, the plaintiff's counsel received an order from the Multidistrict Litigation Panel noting the success of the Multidistrict Litigation in settling a number

of cases and declining to return the cases noted on Exhibit One to the transferor court.

After a delay of approximately one year, plaintiff's counsel received an order from the Eastern District of Pennsylvania again scheduling settlement conferences. Counsel was granted one week within which to schedule a conference call. Ultimately a conference call was held between the more significant defendants and plaintiff's counsel.

I have requested that all defendants request any information necessary in order to fully and completely evaluate the cases set forth in Exhibit One. I have received limited responses. I have offered on two occasions to set aside two complete days of office time, during which I have offered to go through these files in detail with any defendant who believes that information is lacking or that there is any discovery remaining. I have offered to provide releases for both medical and employment information to any defendant. Our jurisdiction has a service "MedRecs" which is a regular participant in our discovery process. I have offered to make a MedRecs release available to any defendant who has not previously requested such a release. *See* Exhibit Two. Very few defendants have availed themselves of these opportunities.

It is significant to note that no opposition to remand was raised before the Multidistrict Litigation Panel by any defendant in this litigation. None of the defendants contacted in the recent conference call opposed remand. If the goal is to have the cases settled, as noted both by the transferee court and the Multidistrict Litigation Panel,

settlement will undoubtedly be accomplished in a just and appropriate manner if these cases are returned to the court of origination It is counsel's belief that none of the defendants oppose plaintiff's counsel's request to return these cases to the transferor court because the defendants have routinely received fair and equitable treatment from the local court and the cases have been resolved with the minimum of transaction costs, promptly and efficiently by the transferor court. Plaintiff is unaware of any defendant in this litigation who opposes plaintiff's repeated requests to return these cases to the transferor court. In fact, any defendant who is legitimately interested in resolving the cases promptly would favor plaintiff's request to return the cases to the transferor court as the cases would then be promptly resolved.

It is unfair and unjust to these plaintiffs to continue to force them to languish in Philadelphia when their cases could be promptly and equitably resolved in Oregon. A process exists for trying these cases, which has proven to be expeditious and just. The settlement and pretrial purposes of this Court have long since been exhausted.

DATED: June 8, 1999

/s/ Jeffrey S. Mutnick
Jeffrey S. Mutnick

SUBSCRIBED AND SWORN to before me this 8th day of June, 1999.

[seal]
OFFICIAL SEAL
JENNIFER DOYLE
NOTARY PUBLIC -
OREGON
COMMISSION NO. 301020
MY COMMISSION
EXPIRES MAY 08, 2001

/s/ Jennifer Doyle
Jennifer Doyle
Notary Public for
Oregon
My Commission
Expires: 05/08/01

EXHIBIT 1

PLAINTIFFS INVOLVED IN MDL 875

CASE NO.	PLAINTIFF
	Baumgardner, Earl
96-1742	Bex, Maxine
89-1054	Burns, Darrel Keith
94-39t	Carter, Will Hill
95-1898	Coady, Robert
95-1613	Combs, Opal (James Lyons)
89-1060	Cote, George
92-1582	Downing, Elmer
95-1337	Dykstra, Charles
96-586	Ehman, Leonard

90-1145	Ellis, Robert
97-1070	Falabella, Dante
97-373	Fields, Carl
89-1407	Foley, Frank
	Frewing, Philip
92-549	Gabelman, Laura
	Gallagher, Donald
	Gardner, Robert R.
	Garner, Keith D.
91-120	Garside, Larry
90-1037	Gorman, Robert
96-116	Graham, Timothy R.
87-497	Gula, Dorothy L.
88-748	Halvorson, Helen M.
89-1058	Hamilton, Margaret
86-904	Hampton, Floyd
	Hansen, Edward (9210-06934)
91-484	Harlin Leonard
	Hartley, Raymond
95-921	Hartney, Robert
97-121	Hayden, Clinton
95-1543	Headley, Joe
	Heard, Wesley (9506-03860)

96-617	Hein, Richard (for Roger)
90-758	Hembree, Earlene
88-034	Hilderbrand, Eugene
94-20	Holt, Lucia
92-1227	Hoski, Joseph
94-131	Housley, Everal A.
97-372	Houx, Jack
84-1058	Howe, Sherman
87-1078	Hughes, Phillis (Gerald)
99-146	Johnson, Earl
91-365	Jones, Viola
95-1028	Klock, William
	Larsen, Frank Emil
92-839	Lamear, Kenneth
	Leach, Esther (9209-06155)
94-19	Lynch, Garry D.
90-839	Maley, Robert
	Martin, William
97-1236	Mathis, Evelynne
96-59	McClinton, Kenneth
94-147	Melborn, Donald
	Norberg, Thomas

89-1104	Orton, Donald
89-1191	Patterson, Willis
98-0065	Polley, Thomas
96-256	Pardue, Leonard
93-1595	Price, Karen (Thomas)
95-1289	Probasco, Melva (George)
93-1014	Quinlan, Ella (Frank)
92-550	Rimkeit, Eugene
	Schlenther, Herbert
95-55	Smith, Loretta (Donald)
97-123	Stonelake, Wendell
95-1628	Swanson, Arvid F.
94-568	Tapp, Jean
95-1233	Vandenburgh, Dale
	Vilhauer, Quinton
95-1630	Williams, Opal
95-1627; 95-953	Wilson, Harold

The New York Petitioners:

No. 87-0871

JoAnn L. Patenaude, As Executrix of the Est. of Robert M. Parenaude, Deceased

No. 87-0874

Frank Dinapoli and wife, Marie Dinapoli
Ronald Greenough, as Pers. Rep of the Estate of Arthur Greenough
Richard Marson
Theresa Prescott, Ind and as PR of the Est of Howard Prescott
Edward Rapp and wife, Betty Rapp
William Rosa and wife, Ruth Rosa
Larry Spoon and wife, Elizabeth Spoon
Kazimer Wavres and wife, Ann Wavres
Brainard Beach and wife, Edith Beach
Howard Coton
Jennie Coluccio, Ind and as PR of the Est of Rocco Coluccio, Deceased
Granville Ebesperger
Theresa Mayotte, Ind and as PR of the Est of Donald Mayotte, Deceased
Richard Messina and wife, Mary Darlene Messina
Gordon Proskine and wife, Teresa Proskine
William B. Charles and wife, Helen Charles
Shirley Francisco, Ind and as PR of the Est of George Francisco, Deceased
Richard Haggerty and wife, Beth Haggerty
Marie Gloria Joseph, Ind and as PR of the Est of Louis Joseph, Deceased
Walter Maychack and wife, Patricia Maychack
Elizabeth Carr, as PR of the Est of Francis McCarty, Deceased
Dolores Agneta, Ind and as PR of the Est of Michael Agneta, Dec'd

Norine Altieri, as PR of the Est of Frank Altieri, Deceased
Robert C. Wood and wife, Mary Wood
Elizabeth Zielinski, Ind and as PR of the Est of Richard Zielinski, Dec'd
David Zuhlsdorf and wife, June Zuhlsdorf
Ronald Tiernan and wife, Violet Tierman
Adelene LaBella, Ind and as PR of the Est of Rocco LaBella, Deceased
Frederick Lennox and wife, Martha Lennox
Francis May and wife, Veronica May
Laurie Briggs, as PR of the Est of Gordon Thornton, Deceased
Evelyn M. Truesdell, as Proposed PR of the Est of Alfred Paolino, Deceased
Alan Davenport
Patricia Beatty, as Proposed PR of the Est of Alton Beatty, Deceased
Stella Fellows Carleo, Ind and as Administratrix of the Est of George Fellows, Sr., Deceased
Franklin H. Jourdanais, as PR of the Est of Thomas F. Jourdanais, Dec'd
Vaughan Roberts, as PR of the Est of Joe V. Roberts, Deceased
Sina Jordan, Ind and as Executrix of the Est of Frank B. Jordan, Deceased
Pauline Edwards, Ind and as Executrix of the Est of George LaClaire, Deceased
Susan M. Nowak, as Executrix of the Est of Joseph Nowak, Deceased, and Frances Nowak, Individually
Patricia Panetta, Ind and as Administratrix of the Est of Michael Panetta, Deceased
Donna Gordon, Ind and as Executrix of the Est of Richard D. Gordon, Deceased
Ruth Hendrick, Ind and as Executrix of the Est of Robert Hendrick, Deceased
Janet Johnson, Ind and as Administratrix of the Est of Robert E. Johnson, Dec'd

Rose Paul Chrmycz, Ind and as Administratrix of the Est of Joseph Paul, Deceased
Marjorie DiNardo, Ind and as Executrix of the Est of Agostino DiNardo, Deceased

87-1021

Anthony J. Perta and wife, Mary Perta
Clara Doherty, Ind and as PR of the Est of Edward Doherty, Deceased
Anna Mae Riegel, Ind and as PR of the Est of Aloysius B. Emmerling, Dec'd
Carol J. Belmont, Ind and as PR of the Est of Alfred M. Belmont, Dec'd

87-1111

Elizabeth Angerosa, as Executrix of the Estate of Anthony Angerosa, Dec.

89-1379

Walter Kowal and wife, Leokadya Kowal
Vincent Charles King
John Joseph Kiley
Thomas Houck, as PR of the Est of Edmund Houck, Dec'd
James D. Gaffney, Sr.
Richard A. Cieri, and wife, Roma Cieri
Henry Hecht, and wife, Francis Hecht
Robert W. Hart, and wife, Loretta E. Hart
Mary Chaney, Ind and as PR of the Est of Harold Chane, Deceased
Margaret A. Durr, Ind and as PR of the Est of Thomas A. Durr, Deceased
Gareld Lee Gallagher

91-0436

Alice M. Pandori, Ind and as PR of the Est of Alfred A. Pandori, Dec'd

The Georgia Petitioners:

1:89-CV-1586-RLV	David W. Barrett
1:89-CV-1569-RLV	Marion Basset, Individually and as Personal Representative of the Estate of John O. Bassett, Deceased
1:89-CV-0810-RLV	Effie Beecham, Individually and as Personal Representative of the Estate of Everett C. Beecham, Deceased
1:89-CV-1677-RLV	Cathy Bennett, Individually and as Personal Representative of the Estate of Russell D. Bennett, Deceased
1:91-CV-643-RLV	William C. Blackwell and Ruth Weaver Blackwell
1:89-CV-1506-RLV	Albert N. Bradley
1:89-CV-1505-RLV	Edward L. Brantly
1:91-CV-647-RLV	Caroline Burris Branton, Individually and as Personal Representative of the Estate of Henry Branton, Deceased
1:91-CV-0642-RLV	Charles Hubert Brown and Betty Jean Brown
1:89-CV-6781-RLV	Walter H. Cain, Jr.
1:89-CV-1583-RLV	Delores Christian, Individually and as Personal Representative of the Estate of Charles Christian, Deceased
1:89-CV-1504-RLV	Betty R. Butler, as Personal Representative of the Estate of Ellis H. Christian, Deceased

1:89-CV-1585-RLV	Jane Clackum, Individually and as Personal Representative of the Estate of James Clackum, Deceased
1:89-CV-1572-RLV	George T. Clement
1:89-CV-1573-RLV	Doris E. Drum and Travis E. Coalson as Co-Personal Representatives of the Estate of Thomas Coalson, Deceased
1:89-CV-1584-RLV	Robert F. Cox, Sr.
1:89-CV-1064-RLV	Barbara Crews, Individually and as Personal Representative of the Estate of James Crews, Deceased
1:89-CV-1581-RLV	Gordon L. David
1:89-CV-1570-RLV	Iva Lee Davis, Individually and as Personal Representative of the Estate of Marion Davis, Deceased
1:89-CV-1571-RLV	Daniel M. Denson
1:89-CV-1840-RLV	Max Ennis
1:89-CV-1582-RLV	Claude C. Evans
1:89-CV-1334-RLV	Emma C. Fannin, Executrix of the Estate of Lavern M. Fannin, Deceased
1:89-CV-2141-RLV	Ruby K. Gaddis
1:89-CV-1508-RLV	Barbara J. Gilbert, Individually and as Personal Representative of the Estate of Barry Gilbert, Deceased
1:89-CV-1333-RLV	Dennis R. Holland, Executor of the Estate of James I. Holland, Deceased

1:89-CV-1759-RLV	Jep Patrick Hudspeth, as Personal Representative of the Estate of J.D. Hudspeth, Deceased
1:91-CV-0645-RLV	John E. Ingle and Blanche P. Ingle
1:89-CV-1564-RLV	Claud G. Langley
1:89-CV-1568-RLV	Andy A. Launiere
1:89-CV-1567-RLV	Thomas J. Lee
1:89-CV-1063-RLV	Yancey Payne
1:89-CV-1579-RLV	Richard H. Ringwall
1:89-CV-1565-RLV	Harold W. Ross
1:89-CV-1507-RLV	John Royster
1:89-CV-1578-RLV	Bryan Reid Sanders and Julie Allison Sanders, as Co-Personal Representatives of the Estate of Billy B. Sanders, Deceased
1:89-CV-1580-RLV	Russell Smith
1:89-CV-1566-RLV	David Strickland
1:89-CV-1784-RLV	John Robert Tidwell
1:91-CV-646-RLV	Tony Alford Watkins
1:91-CV-0644-RLV	Walter E. Watson
1:89-CV-1111-RLV	Walter E. White
1:89-CV-1577-RLV	Martha J. Whitten, Individually and as Personal Representative of the Estate of James A. Whitten, Deceased
1:87-CV-1328-RLV	Thomas L. Yates

The Oregon Petitioners:

3:89-1407	Frank Foley, et al.
3:90-131	George Wood
3:90-839	Robert Maley
3:90-879	William Jimenez
3:90-929	Winifred Bohna
3:90-1314	Kathleen L. Bradley
3:91-141	Lyle Burgess
3:91-365	Viola B. Jones
3:91-485	Aldo Baldisseri
3:91-528	Diane Mathers
3:92-159	Jerry Horn
3:92-839	Kenneth L. Tamear
3:92-900	Jack Beeson
3:92-1202	John A. Roberts
3:92-1582	Elmer E. Downing, Jr.
3:92-1606	Hazel Evans
3:94-19	Garry D. Lynch
3:94-20	Lucia C. Holt
3:94-71	Charles Ziesler
3:94-131	Everal A. Housley
3:94-147	Donna Lee Melhorn, et al.
3:94-382	Earl C. Baumgardner
3:94-391	Will Hill Carter

3:94-438	Tilford Aanderud
3:94-556	Gordon Winn
3:94-568	Jean V. Tapp
3:94-679	Arthur Johansen
3:94-924	George A. Lee
3:94-976	Walter R. Sandbert
3:94-1226	H. Philip Eder, etc.
3:94-1236	Margaret K. Rogers
3:94-1351	Fern Greenhalgh, et al.
3:94-1525	Michael Bradley, et al.
3:95-55	Loretta M. Smith, et al.
3:95-156	Wayne McArthur
3:95-326	Helen Carlson, et al.
3:95-721	Leota Olsen, et al.
3:95-953	Harold R. Wilson
3:95-965	Archie Wade Horn
3:95-1028	William G. Klock, et al.
3:95-1233	Michael Vandenburgh
3:95-1289	George Weller Probasco, et al.
3:95-1337	Faye Y. Carlson, et al.
3:95-1472	Billye Hicks, et al.
3:95-1543	Joseph R. Headley
3:95-1613	James E. Lyons, et al.
3:95-1614	W. Kirk Braun

3:95-1615	Neal McCaslin
3:95-1616	John McLeod
3:95-1617	Jane Leonaitis, et al.
3:95-1618	Roy P. Barnes
3:95-1627	Harold Wilson, Jr.
3:95-1628	Gerald Swanson, et al.
3:95-1629	Mary Dudley, et al.
3:95-1630	Opan Williams
3:95-1631	Stanely S. Betty
3:95-1898	Audrey Coady, et al.
3:96-54	Keena Spence, et al.
3:96-59	Patricia Ann. McClinton, et al.
3:96-116	Timothy Graham
3:96-256	Leonard Pardue
3:96-270	Earnest Morris Jauron
3:96-586	June Z. Ehman, et al.
3:96-617	Richard D. Hein
3:96-789	Mae Williams
3:96-1400	Gladys Linne
3:96-1471	Edward Kramer

Supreme Court, U.S.
FILED
OCT 23 2000
CLERK

No. 00-281

IN THE

Supreme Court of the United States

JOANN PATENAUDE, *et al.*,

Petitioners,

v.

OWENS-ILLINOIS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT OWENS-ILLINOIS, INC.

ROBERT H. RILEY
CATHERINE M. MASTERS
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Dated: October 23, 2000

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QUESTION PRESENTED FOR REVIEW

When a case is transferred for coordinated or consolidated pretrial proceedings under the multidistrict litigation statute, 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation must remand it to the original district "at or before the conclusion of such pretrial proceedings" (unless the case is resolved in the transferee district). If the Panel declines to remand a case upon request, Section 1407(e) makes its decision reviewable, but only by extraordinary writ under 28 U.S.C. § 1651. Here, the Panel declined to remand the Petitioners' cases, on the ground that pretrial proceedings had not concluded, and the Third Circuit declined to issue a writ of mandamus. The question presented is whether the Court of Appeals abused its discretion in denying mandamus, when

(a) the Petitioners' background assertions, that MDL 875 as a whole encompasses no legitimate multidistrict activity and is a failure, are not only unsupported, but untrue; and

(b) the Petitioners' specific assertions, that their cases have languished for years in inaction, are also not only unsupported, but untrue.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Respondent Owens-Illinois, Inc. is a publicly-held corporation. The following entities hold 10% or more of Owens-Illinois stock: KKR Associates, L.P. (23.1%); FMR Corp. (11.3%). Shares shown as owned by KKR Associates, L.P. are owned of record by three limited partnerships of which KKR Associates, L.P. is the sole general partner and as to which it possesses sole voting and investment power. Owens-Illinois has received a Schedule 13G filed by FMR Corp., Edward C. Johnson 3d, Abigail P. Johnson and Fidelity Management & Research Company with respect to the shares of Common Stock identified as owned as of December 31, 1998 and in which such reporting persons assert dispositive and/or voting power with respect to portions of or all of such shares as a result of their direct or indirect investment advisory relationship to, or ownership interest in, various investment companies, institutional accounts or investment advisors which own such shares.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties and Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
A. The Creation and Success of MDL 875.	2
B. The Present Cases.	7
1. History of Remand Requests.	7
2. Successful Resolution of Petitioners' Claims.	8
Reasons for Denying the Writ	9
I. The Third Circuit's Interpretation of Section 1407 Does Not Merit Review.	9
II. The Lower Courts' Factual Findings Do Not Merit Review.	13
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 12

Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998) 12

In re Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) 3

In re Asbestos Products Liability Litigation (No. VI) (J.P.M.L. Sept. 30, 1996) 5

In re Asbestos Products Liability Litigation (No. VI) (J.P.M.L. May 20, 1998) 5, 6

In re Asbestos Products Liability Litigation (No. VI) (J.P.M.L. Feb. 5, 1999) 6

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In re Cimino, No. 99-1217, slip op. (3d Cir. July 26, 1999) 7

Lexecon v. Milberg, Weiss, Bershad, Hynes & Lerach, 523 U.S. 26 (1998) 2, 9, 13

Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999) .. 12

Cited Authorities

Page

Statutes:

28 U.S.C. § 1407 ..... i, 2, 9, 10, 12

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28 U.S.C. § 1651 i

Rules:

Fed. R. Civ. P. 23(b)(1)(B) 12

Fed. R. Civ. P. 23(b)(3) 12

J.P.M.L.R. 7.6(d) 13

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Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate on S. 3815, 89th Cong. 2d Sess. (Oct. 20-21, 1966) 10, 11, 12

H.R. Rep. No. 1130, 90th Cong., 2d Sess. 1968, 1968 U.S.C.C.A.N. 1898 (Feb. 28, 1968) 10

H.R. Rep. No. 1130, 1968 U.S.C.C.A.N. 1900 11

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (March 1991) 3

STATEMENT OF THE CASE

MDL 875, established in 1991 by the Judicial Panel on Multidistrict Litigation in response to a judicial "asbestos crisis," is the pretrial consolidation of all federal asbestos-related personal injury and wrongful death claims, before Hon. Charles R. Weiner in the Eastern District of Pennsylvania. The Petitioners' claims are among the more than 70,000 cases (encompassing more than 4 million claims) that have been transferred to MDL 875. Despite the fact that, under Judge Weiner's stewardship, more than 72% of all asbestos claims in MDL 875 have been resolved, the Petitioners assert that MDL 875 is worthless and ineffective as a whole, and has so failed in their cases in particular that their claims must be remanded to the federal district courts from which they were transferred.

Although Judge Weiner has suggested remand of approximately 1,000 cases from MDL 875 (cases as to which, in his judgment, the consolidated and coordinated proceedings had been exhausted), he never suggested that the present cases are ripe for remand (and indeed, only a fraction of the Petitioners even sought a suggestion of remand from him). Most of the Petitioners requested the Panel to remand their claims, but the Panel declined, on the grounds that MDL 875 continues to encompass coordinated pretrial proceedings, and that Judge Weiner generally knows best when those proceedings are exhausted in individual cases. The Petitioners sought a writ of mandamus from the Third Circuit to compel the Panel to order remand, but the Third Circuit declined to order this extraordinary remedy, when no clear entitlement to it existed (indeed, the Petitioners provided no hard evidentiary basis for such relief — no docket sheets, settlement information, etc.), and the Panel

had not egregiously erred. Now the Petitioners (including some who withdrew their request for relief in the Third Circuit) ask this Court to review the Third Circuit's decision.

The Petitioners contend that (i) the Third Circuit legally erred, misconstruing Section 1407 and this Court's *Lexecon* decision[1] in holding that "coordinated and consolidated pretrial proceedings" include, *inter alia*, supervision of individual settlement negotiations and conferences,[2] and (ii) the lower courts factually erred by not finding that the Petitioners' pretrial proceedings were exhausted. Neither issue merits review. The Petitioners' legal contention is not an issue of great importance and is, in any event, palpably wrong: the Third Circuit's holding is expressly and correctly based on *Lexecon*. The Petitioners' factual contention (which was considered and rejected by as many as three courts), even if it had any demonstrated merit, is not the kind of question worthy of review on certiorari.

A. The Creation and Success of MDL 875.

As set forth in the Brief in Opposition filed by counsel for the Center for Claims Resolution (which Owens-Illinois adopts), MDL 875 was created in 1991 in response to an asbestos litigation crisis in the federal courts. In invoking MDL procedures, the Panel responded to the plea of

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1. *Lexecon v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998).

2. The proceedings in MDL 875 are not limited to such activity. As the Third Circuit noted, Judge Weiner is also overseeing discovery regarding litigation screenings, sponsored by plaintiffs' lawyers to generate additional lawsuits that continue to be filed in huge numbers throughout the country. App. 17

the Judicial Conference Ad Hoc Committee on Asbestos Litigation, that " 'the federal judiciary must itself act now to achieve the best performance possible from the system under current law.' " *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415, 420 (J.P.M.L. 1991), *quoting* Report of the Ad Hoc Committee (March 1991) at 4.

Judge Weiner's performance as transferee judge in MDL 875 has been widely acclaimed. The Administrative Office of the U.S. Courts, in its report surveying the five-year period through FYE September 30, 1997, observed:

> In July 1991, an order was issued transferring asbestos cases to the Eastern District of Pennsylvania (PA-E). As of September 30, 1997, 69,038 cases had been filed in or transferred to PA-E. In addition to closing more than 44,723 of those cases, the presiding judge has closed over 72 percent of the 4,231,123 claims encompassed in the 69,087 cases gathered in the transferee district, orchestrated settlements with respect to unfiled claims, and facilitated settlements of claims in several state court jurisdictions at the request of state court judges.
>
> . . . .
>
> . . . Judge Weiner of the Eastern District of Pennsylvania was able to close 6,168 asbestos cases this fiscal year, compared to an average of 385 civil cases per authorized judgeship.

Federal Judicial Caseload: A Five-Year Retrospective (available at www.uscourts.gov) at 7, 8 (3d Cir. Supp. App. 8, 9).

Indeed, MDL 875 has been successful in ways beyond those noted in the Administrative Office's report. More recently, nearly 10,000 cases per year have been closed. App. 9. And in addition to the cases officially closed, many more have been resolved pending paperwork. In denying a 1996 request that he suggest wholesale remand of transferred cases, Judge Weiner not only described the procedures under which the parties had settled many current cases (then 40,000 out of 62,000 cases) and agreed on a claims handling process for future claims, but also noted that thousands of additional cases had been resolved in fact, though the paperwork had not been completed. *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 539589, at *1 & n.3 (E.D. Pa. Sept. 16, 1996).[3] Judge Weiner noted that "[a]ll counsel who have cooperated with each other and have diligently pursued their cases and claims, and have sought the aid of the Court, have achieved a successful conclusion for their clients." *Id.* at *3.

As the Third Circuit noted, Judge Weiner *has* suggested remand of approximately 1,000 cases in which he judged

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3. Judge Weiner explained the paperwork lag:

> Many of the plaintiffs' counsel, and certainly most of the defendants, are engaged in thousands of cases. When settlement occurs, medical and exposure details may still need to be provided, releases must be signed, and frequently, the payout period may extend for several years. The last matter tended to by counsel is usually the submission of a dismissal order. As a result, the Court often finds that cases which remain on the dockets with seemingly large numbers of remaining defendants are either settled completely or have only one or two actual claims remaining.

Id. at *1 n.3.

the pretrial procedures to be exhausted. App. 9. As Judge Weiner has noted, in such cases "all but one or two defendants" typically have settled or been dismissed by the time of remand, "and then, they routinely settle in total without trial. Of the very few trials which have actually occurred following transfer, a number have resulted in defense verdicts." *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 539589, at *1 n.2.

The Judicial Panel on Multidistrict Litigation itself has commended Judge Weiner's continuing success in MDL 875. Several times — including here — it has denied motions for broad-scale remand to the transferor courts, absent Judge Weiner's suggestion, because his great success in handling MDL 875 has earned him deference in judging when the coordinated pretrial process was exhausted and remand was appropriate. *See In re Asbestos Products Liability Litigation (No. VI)*, at 2 (J.P.M.L. Sept. 30, 1996) (denying motions to remand all MDL 875 cases, or certain Florida cases) (3d Cir. Supp. App. 21);[4] *In re Asbestos Products Liability Litigation*

4. In this opinion, the Panel commended Judge Weiner's success in "(i) prioritizing serious disease cases, (ii) encouraging settlements, (iii) reducing transactions costs, and (iv) protecting the continued viability of defendants." *Id.* at 2.

The Petitioners claim that in prioritizing serious disease cases, Judge Weiner has refused to accelerate any case unless it involves a claimed malignancy. In support of this assertion below, they pointed to Administrative Order No. 3 as reproduced in their Appendix — though what they reproduced was an unsigned draft, of unknown lineage, never entered by Judge Weiner. The real Administrative Order No. 3 allows acceleration of any serious case, whether or not involving malignancy. *See* Attachment to Owens-Illinois' letter brief filed with the Third Circuit on 04/21/00.

(Cont'd)

(No. VI), at 2 (J.P.M.L. May 20, 1998) (App. 48) (denying motion to remand certain Oregon cases, noting that by May 5, 1998 Judge Weiner had closed 53,687 cases and returned 976 cases, including 29 Oregon cases, to the transferor courts); *In re Asbestos Products Liability Litigation (No. VI)*, at 2 (J.P.M.L. Feb. 5, 1999) (App. 58) (denying motion to remand certain New York and Georgia cases, noting that Judge Weiner had closed nearly 60,000 cases and returned nearly 1,000 cases, including 15 New York and 3 Georgia cases, to the transferor courts).

The Third Circuit has also repeatedly recognized the success of MDL 875. In 1999, the court noted:

> Judge Weiner . . . has had great success in handling the tsunami of asbestos cases sent his way. Almost 27,000 cases were initially consolidated in 1991. Since then, including the addition of tag-along cases, he has disposed of nearly 60,000. Also, nearly 1,000 actions or claims have been returned to their original transferor districts. Judge Weiner has proven himself an able manager of litigation that at every

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(Cont'd)

The Panel's and Judge Weiner's concern about the "continued viability of defendants" was, and remains, valid. Before MDL 875, 70% of asbestos product manufacturers, by market share, were in bankruptcy. During the first seven years of MDL 875, no further bankruptcies of asbestos defendants occurred. Even with Judge Weiner's successful efforts to coordinate the federal asbestos litigation, however, more major asbestos defendants have recently become insolvent and filed for bankruptcy protection, including most recently Owens Corning only this month. In these circumstances, coordination of the litigation is especially important.

> level has been described as vexing. . . . The "just and efficient conduct" of the actions will therefore be well served by . . . transfer to [Judge Weiner's] watch.

In re Cimino, No. 99-1217, slip op. at 9 (3d Cir. July 26, 1999). And in its decision below, the court again noted Judge Weiner's success:

> This process has resulted in numerous cases being resolved. As of late 1996, some 62,000 cases had been assigned to MDL 875 and approximately 40,000 had been resolved. The remaining 22,000 cases included thousands of cases that had been resolved but not yet dismissed. As of January 1999, nearly 60,000 cases had been closed. Thus, in 1997 and 1998, the transferee court closed nearly 10,000 cases a year.

App. 9 (internal citations omitted).

B. The Present Cases.

1. History of Remand Requests.

The present proceeding involves groups of cases transferred to MDL 875 from New York, Georgia, and Oregon. Each Petitioner (assertedly 216 in all) sought a writ of mandamus to compel remand from MDL 875 back to the transferor court (though one of the present Petitioners, Thomas Yates, withdrew his request for mandamus below because he had resolved his case in full, and twelve of the Georgia Petitioners withdrew their request for mandamus below because they had never sought remand from the Panel).

Few of the Petitioners sought a suggestion of remand from Judge Weiner — ten of the New York petitioners, eight of the Georgia petitioners, and only one of the Oregon petitioners (according to the docket sheets and the materials presented by the petitioners below). As the Third Circuit noted, "[s]ome, but not all, of the New York plaintiffs," "[s]ome, but not all, of the Georgia plaintiffs," and an undisclosed number of the Oregon plaintiffs filed such motions. App. 3-4.

2. Successful Resolution of Petitioners' Claims.

The Petitioners repeatedly assert that their cases have languished in inaction for years in MDL 875. *See, e.g.*, Pet. 20 (Petitioners "have waited for years," "stuck in the black hole of MDL 875"), *id.* at 16 ("Petitioners' repeated, good faith efforts to settle their claims with all defendants have failed due to the lack of a trial setting"). This assertion is untrue as to Owens-Illinois. Owens-Illinois has resolved the claims of every one of the Petitioners who asserted claims against it. *See* 3d Cir. Supp. App. 37, ¶ 5; *id.* at 38-39, ¶ 3.[5] Indeed, as set forth in the Center for Claims Resolution Brief in Opposition, the docket sheets show and the Third Circuit

5. Despite the fact that Owens-Illinois has resolved all of these claims, the Petitioners nevertheless named Owens-Illinois as a Respondent both in this Court and below. (Below, they asserted that one Petitioner's claim against Owens-Illinois remained unresolved, an assertion unsupported by any evidence and inconsistent with Owens-Illinois' records.) To the extent the Petitioners assert that MDL 875 as a whole is a "Dickensian saga" that must end, of course, Owens-Illinois, which has been named as a defendant in thousands upon thousands of cases based on its manufacture of a single specialty asbestos-containing product for a brief period ending more than 42 years ago, is vitally interested.

recognized that many of the Petitioners have reached substantial settlements with many defendants. App. 6-7.

REASONS FOR DENYING THE WRIT

Certiorari is reserved for cases presenting exceptionally important issues, such as when there is a split of authority, or the lower court strayed from this Court's prior holdings. This is not such a case. The legal issue — whether the Third Circuit legally erred in denying mandamus — is not exceptionally important, both because mandamus is itself an exceptional remedy, rarely granted, and because the Third Circuit's decision was completely consistent with this Court's prior holding in *Lexecon* and with Section 1407. The factual issue — whether in fact the pretrial process has been exhausted in the Petitioners' particular cases — is fact-bound and not the kind of issue meriting review on certiorari.

I. The Third Circuit's Interpretation of Section 1407 Does Not Merit Review.

For the reasons stated in the Brief in Opposition filed by counsel for the Center for Claims Resolution, which Owens-Illinois adopts, there is no basis to review the Third Circuit's decision, for it does not conflict either with Section 1407 or with *Lexecon*. Nor did the Third Circuit commit any other legal error — its decision was discretionary, and the requested writ of mandamus is an extraordinary one — much less a profound error meriting review.

Indeed, the Petitioners' primary contention — that coordination of litigation, including sequencing of cases for resolution and overseeing settlement discussions, is not legitimate MDL activity — is flatly contradicted by the legislative history of Section 1407.

The legislative history confirms that multidistrict transferee courts are empowered to conduct the full range of pretrial proceedings (defined as "the practice and procedure which precede the trial of an action"), with the core goal of obtaining "economy and efficiency in judicial administration." H.R. Rep. No. 1130, 90th Cong., 2d Sess. 1968, 1968 U.S.C.C.A.N. 1898, 1900 (Feb. 28, 1968). *See also* Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate on S. 3815, 89th Cong. 2d Sess. (Oct. 20-21, 1966) ("Senate Hearings"), at 13 ("the cases concerned would be brought within the control of a single district and so the very same powers provided by the Federal Rules of Civil Procedure should permit all of the same kinds of steps to be carried out by the presiding district judge").

Among these pretrial powers are sequencing cases for resolution and facilitating settlement. The major impetus for enactment of Section 1407 was the courts' experience during the 1960s with electrical equipment antitrust litigation, when in the wake of criminal antitrust proceedings more than 1,800 civil antitrust claims were filed in 33 federal districts. H.R. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1899. In the absence of any formal multidistrict procedure, the courts, with the active help of a Coordinating Committee established by the Judicial Conference, relied on voluntary cooperation among judges and parties to coordinate and manage the proceedings. *Id.* Section 1407 was designed to provide a more secure foundation to achieve in future cases the coordination delicately achieved in the electrical equipment litigation. *Id.*

Consolidated discovery was one of the achievements in the electrical equipment cases, but not the only one.

The Coordinating Committee members who testified in congressional hearings emphatically rejected the notion that a multidistrict transferee judge should be limited to conducting "national discovery." *See* Senate Hearings at 13-15 (test. of Dean Phil C. Neal), 56-57 (test. of Hon. William H. Becker). One of the major achievements did not relate to discovery at all, but to ordering the cases for resolution:

> One of the key problems in trying to move this whole mass of litigation along faster was to decide on the relative priority to be given to different groups of the cases. The committee decided quite early in its work that it would be unwise to attempt to advance all of the cases simultaneously and that an orderly sequence should be set up. The result was to establish certain priority product lines which were singled out for initial special treatment . . . .

Id. at 9 (test. of Dean Neal). Another major achievement was resolution of most cases by settlement. *Id.* at 11-12 (test. of Dean Neal).

The legislative history underscores that Section 1407 was intended to be flexible and adaptable to the challenges of other kinds of cases, including product liability cases. H.R. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1900; Senate Hearings at 5-6 (test. of Hon. Edwin A. Robson); *id.* at 17 (statement of Judge Becker); *id.* at 55 (comments of Sen. Joseph D. Tydings, Hon. Alfred P. Murrah).

Although the Petitioners frame the issue as one of statutory interpretation, their Petition — asserting that "[t]he

time has finally come to write the last chapter in the Dickensian saga of MDL 875," Pet. 2 — is an unconcealed challenge to the legitimacy of MDL 875 as a whole. As the Petitioners note, certain litigation tools have not proved helpful in managing asbestos litigation. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (overturning attempted class action settlement of future claims under Fed. R. Civ. P. 23(b)(3)); *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999) (overturning attempted class action settlement of future claims under Rule 23(b)(1)(B)); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998) (overturning attempted mass trial resolution of 3,000 cases). That is no basis, however, for the Court to consider throwing out the one tool that *has* proved helpful, multidistrict coordination, at a time when it is needed most.

As Judge Murrah observed about the electrical equipment cases that were the impetus for the creation of Section 1407, the alternative to multidistrict coordination was

> utter chaotic failure, because these cases just simply could not be tried in all of the districts in which they were filed. . . . [M]ultiple-district litigation can very well break our backs out of sheer weight of numbers unless we do have an orderly procedure for it. . . . If we do not have orderly procedure about this, then we have utter chaos in the courts. It just comes to that.

Senate Hearings at 54-55. The Court should not accept the Petitioners' invitation to turn its back on multidistrict coordination and resign asbestos litigation to "utter chaos."

II. The Lower Courts' Factual Findings Do Not Merit Review.

Lexecon does hold that when coordinated and consolidated pretrial proceedings have concluded, the Panel must remand the case to the transferor court (subject to a proviso concerning the severance of claims). But *Lexecon* did not address how courts should determine whether pretrial proceedings have concluded, for in *Lexecon* there was no question: the case was set for trial, an unambiguous signal of the end of pretrial proceedings. No such unambiguous signal existed in any of the Petitioners' cases.

The Panel Rules make plain that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." J.P.M.L.R. 7.6(d). This rule is not improper, for the Panel must have some basis to evaluate whether the pretrial proceedings are indeed complete.

Here, the transferee court, in declining to issue a suggestion of remand to those few Petitioners who requested one, indicated that pretrial proceedings in the Petitioners' cases had not concluded. The Petitioners in turn failed to persuade the Panel and the Third Circuit that Judge Weiner was wrong. Contrary to the Petitioners' assertions, these actions do not "conclusively thwart" the Panel's ultimate obligation to remand, for the Panel has remanded 1,000 previous cases, and will continue to remand cases when it is persuaded that pretrial proceedings have concluded.

The Petitioners' failure to persuade the lower courts that coordinated and consolidated pretrial proceedings had ended in their individual cases merits no reexamination by this Court.

CONCLUSION

For the foregoing reasons, Owens-Illinois, Inc. respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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(3)

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No. 00-281

IN THE

Supreme Court of the United States

JOANN PATENAUDE ET AL., *Petitioners*,

v.

OWENS ILLINOIS, INC., ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ARMSTRONG WORLD INDUSTRIES, INC., GASKET HOLDINGS, INC., T&N, LTD., PFIZER INC., AND UNITED STATES GYPSUM COMPANY

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October 23, 2000

17 pp.

RULE 29.6 STATEMENT

Respondent Armstrong World Industries, Inc. is wholly owned by Armstrong Worldwide, Inc., which is wholly owned by Armstrong Holdings, Inc., a publicly held company.

Respondent Gasket Holdings, Inc. (formerly known as Flexitallic, Inc.) and respondent T&N, Ltd. (formerly known as T&N plc) are owned by Federal-Mogul Corporation, a publicly held company.

Respondent Pfizer Inc. has no parent company, and no publicly held company holds ten percent or more of its stock.

Respondent United States Gypsum Company is owned by USG Corporation, a publicly held company.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. History of MDL No. 875 2

B. Coordinated Activities Before the Transferee Court 3

C. The Transferee Court's Handling of Petitioners' Cases 4

D. The Multidistrict Panel's Denial of Petitioners' Remand Motions 5

E. The Third Circuit's Denial of Mandamus 6

REASONS FOR DENYING THE WRIT 8

A. The Decision Below Correctly Applied § 1407 9

B. The Decision Below Does Not Conflict with *Lexecon* 10

C. The Real Issue Here is Factual 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES: Page

Carlough v. *Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993) 3
In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) 2, 3
In re Patenaude, 210 F.3d 135 (3d Cir. 2000) 4, 5
Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) . . . . . *passim*
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999). 4

STATUTES:

28 U.S.C. § 1407(a) . . . . . *passim*

MISCELLANEOUS:

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) 2
Administrative Office of the United States Courts, U.S. District Courts—Civil Cases Commenced, by Nature of Suit During 12-Month Periods Ending September 30, 1995 Through 1999 (Table C-2A) 4

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STATEMENT OF THE CASE

Petitioners comprise three groups of plaintiffs seeking damages for personal injury and wrongful death as a result of alleged exposure to asbestos and asbestos-containing products. Respondents, who are (or were) members of the Center For Claims Resolution ("the CCR"), which acts herein as their agent, are defendants in some of the cases brought by Petitioners.[1]

[1] The CCR is a non-stock, non-profit corporation established in 1988 to handle personal injury asbestos claims asserted against its members, who have designated the CCR as their exclusive agent to act on their behalf in asbestos cases. These respondents are current CCR members, except for Gasket Holdings, Inc., which was formerly a CCR member and has authorized the CCR to act on its behalf herein. Before the Third Circuit, the CCR also acted as agent for the Asbestos Claims Management Corporation and GAF Corporation, but those companies are no longer CCR

Petitioners' claims were initially pending in the Northern District of New York (the "New York Petitioners"), the Northern District of Georgia (the "Georgia Petitioners"), and the District of Oregon (the "Oregon Petitioners"). Their claims were transferred under 28 U.S.C. § 1407(a) by the Judicial Panel on Multidistrict Litigation (the "Multidistrict Panel") to Multidistrict Litigation No. 875 ("MDL No. 875"), pending in the United States District Court for the Eastern District of Pennsylvania (the "transferee court"). The transferee court declined requests by some petitioners for a suggestion of remand, the Multidistrict Panel denied motions for remand, and the Third Circuit denied Petitioners' petition for a writ of mandamus.

A. History of MDL No. 875.

The Multidistrict Panel created MDL No. 875 in 1991 after finding that the more than 30,000 asbestos-related personal injury or wrongful death actions then pending in the federal courts had "reached a magnitude * * * that threatens the administration of justice and that requires a new, streamlined approach." *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 418 (J.P.M.L. 1991). The Multidistrict Panel was heavily influenced by the recommendations of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, whose members were appointed by the Chief Justice. The Committee described the growing number of asbestos claims as a "disaster of major proportions to both the victims and the producers of asbestos products." *Id.* at 418 (quoting *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 1-3 (1991)).

The Panel sought to address these problems by centralizing asbestos-related personal injury and wrongful death claims in the Eastern District of Pennsylvania before the Honorable Charles R. Weiner, an experienced district court judge whom the Panel praised for his "familiar[ity] with the issues in asbestos litigation" and his "track record of accomplishment and successful innovation." 771

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members, and the CCR does not act on their behalf here.

F. Supp. at 423. In its 1991 Order, the Panel urged Judge Weiner to consider a variety of innovative approaches to the resolution of asbestos claims. *Id.* at 420-22.

B. Coordinated Activities Before the Transferee Court.

As the Third Circuit explained, Judge Weiner gives greatest priority to plaintiffs with the most serious illnesses, and encourages resolution of cases through negotiation and settlement whenever possible. Pet. App. 7-8. That approach is reflected in Administrative Order No. 3, entered by the transferee court on September 8, 1992. The Order establishes a mandatory discovery and negotiation process, and sets priorities for remand to transferor courts based on the severity of plaintiffs' medical conditions. *Id.* at 8-9. The Order also provides that, if a case does not settle after good faith negotiations, "the Court shall determine whether the matter is appropriate for immediate remand." *Id* at 8. As Judge Weiner has explained, he typically does not suggest remand unless and until "all avenues of settlement [have been] exhausted." *Id.*

Administrative Order No. 3, together with Judge Weiner's personal involvement in settlement efforts, have produced remarkable results. As the Third Circuit noted below, "[a]s of late 1996, some 62,000 cases had been assigned to MDL 875 and approximately 40,000 had been resolved." Pet. App. 9. In addition, many of the 22,000 remaining cases had been resolved but not yet dismissed. *Id.* Moreover, as of January 1999, nearly 60,000 cases had been closed, meaning that Judge Weiner closed cases in 1997 and 1998 at the rate of nearly 10,000 a year. *Id.*[2]

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[2] Judge Weiner has sought to resolve cases in the docket on a comprehensive basis, and, under his auspices, many large group settlements have been negotiated. See *Carlough* v. *Amchem Products, Inc.*, 5 F.3d 707, 711 (3d Cir. 1993).

When avenues for settlement have in fact been exhausted, Judge Weiner has not hesitated to remand cases for trial, and in fact has remanded nearly 1,000 actions or claims. *Id.*[3]

Finally, as the Third Circuit noted, Judge Weiner has also conducted coordinated discovery involving "many cases from many different transferor courts." Pet. App. 17. Over the past two years, Judge Weiner has overseen global discovery into plaintiffs' practice of filing cases on the basis of medical data obtained from attorney-sponsored asbestos screening programs. See *id.*

C. The Transferee Court's Handling of Petitioners' Cases.

Judge Weiner has participated in numerous settlement conferences in Petitioners' cases. Some of these conferences took place after Judge Weiner did not grant Petitioners' requests for suggestions of remand. Pet. App. 59. As the Third Circuit noted below, "the number and amount of settlements [for these particular plaintiffs] have in many cases been substantial." Pet. App. 6-7. For example, based on data in docket sheets for the New York Petitioners, by late 1999, when the parties filed briefs before the Third Circuit, the named Petitioner, Jo-Anne L. Patenaude, had received $739,135 in settlements, $201,000 of which was received after the Multidistrict Panel's February 1999 Order denying remand.[4] The docket sheets for the six actions brought by the New York Petitioners alone showed that, by late 1999, defendants had paid almost $5.8 million to settle the claims of those Petitioners, of

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[3] Recent statistics concerning asbestos personal injury filings in federal courts demonstrate the continuing need for MDL No. 875. In the past decade, 80,000 asbestos cases were filed, 18,000 of them in 1998 and 1999. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 866 (1999) (Breyer, J., dissenting); Administrative Office of the United States Courts, U.S. District Courts—Civil Cases Commenced, by Nature of Suit During 12-Month Periods Ending September 30, 1995 Through 1999 (Table C-2A).

[4] Brief of Respondents Armstrong World Industries, Inc. *et al.* at 10, *In re Patenaude*, 210 F.3d 135 (3d Cir. 2000) (No. 99-1540) (filed Nov. 15, 1999).

which approximately $1.1 million came from settlements reached after the Panel's February 1999 Order denying remand.[5] Moreover, as the Third Circuit noted, these figures may significantly understate the actual settlement amounts obtained by Petitioners, for "the docket summaries show significant delays (in some cases, five years) between settlements being signed and their being entered on the docket." Pet. App. 7.

The Third Circuit also noted that Petitioners did not contest these figures by "provid[ing] settlement information of their own." *Id.* at 6.

D. The Multidistrict Panel's Denial of Petitioners' Remand Motions.

On May 30, 1997, certain of the Oregon Petitioners asked Judge Weiner to issue a suggestion of remand to the Panel. Certain of the New York Petitioners filed a similar motion in March of 1998, as did certain of the Georgia Petitioners on April 29, 1998 and May 15, 1998. When Judge Weiner did not issue such suggestions, the various groups of Petitioners sought remand directly from the Multidistrict Panel.

The Multidistrict Panel denied the motions in Orders of May 20, 1998 (denying the motion of the Oregon Petitioners) and February 5, 1999 (denying the motions of the New York and Georgia Petitioners). Pet. App. 47-49, 58-59. In the latter Order the Panel noted that it

> has consistently given great weight to the transferee judge's determination that remand of a particular

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[5] *Id.* at 12. Unlike the docket sheets for the New York claims, the docket sheets for the Georgia and Oregon cases do not list settlement information. It is quite likely, however, that many of those plaintiffs have also obtained significant settlements. For example, in its Answer to Petitioner's Petition for a Writ of Mandamus, defendant Owens-Illinois, Inc. ("O-I") stated that it had settled *all* of Petitioners' claims. See O-I Answer at 5, ¶ 9, *In re Patenaude*, 210 F.3d 135 (3d Cir. 2000) (No. 99-1540) (filed Aug. 4, 1999).

> action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings. * * * Absent a notice of suggestion of remand from the transferee judge to the Panel, any party advocating remand before the Panel bears a strong burden of persuasion. (Pet. App. 58 (citations omitted)).[6]

The Multidistrict Panel then noted that the transferee court was "thoroughly familiar with the issues in MDL-875" and, "in light of the unprecedented scale of this docket, is in the best position to determine the future course of the actions before him." *Id.* The Panel found it significant that Judge Weiner had continued to hold settlement conferences in various actions brought by Petitioners even after they had sought remand from him. *Id.* at 59. In the view of the Panel, "[s]uch a scenario illustrates why the Panel is reluctant to rely solely on the conclusions of parties to an action when determining whether remand is appropriate." *Id.*

E. The Third Circuit's Denial of Mandamus.

On June 29, 1999, thirteen months after the Multidistrict Panel denied the Oregon Petitioners' motion and nearly five months after it denied the New York and Georgia Petitioners' motions, the Petitioners filed a single petition for a writ of mandamus in the Third Circuit.

The Third Circuit denied the writ, taking particular notice of Judge Weiner's success in settling and remanding cases and the numerous and significant settlements reached by these Petitioners. Pet. App. 6-9. The court held that the Petitioners who had never sought a suggestion of remand from Judge Weiner could not show that they had no other adequate means to obtain relief, *id.* at 11-12, and that the remaining Petitioners had not shown a "clear and indisputable" right to relief. *Id.* at 12-22.

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[6] Multidistrict Panel Rule 7.6(d) provides that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee court."

The court rejected Petitioners' argument that cases transferred under § 1407 must be remanded to the transferor court unless the transferee court is conducting global discovery affecting all claims. *Id.* at 17. Instead, relying on this Court's analysis in *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), and the legislative history of § 1407, the court held that cases in an MDL proceeding can be "coordinated" under § 1407, even in the absence of one issue common to all cases, "so long as issues 'overlap.'" Pet. App. 17 (citations omitted). Looking to the facts before the Multidistrict Panel in the Petitioners' cases, the court held:

> In the instant case, where the possibility exists that even individual settlement negotiations will be more efficient if facilitated by a judge who is intimately familiar with the general issues and many of the parties, and where in fact the record reflects that settlements are successfully being negotiated, one cannot say that the Panel abused its discretion in refusing to remand. (*Id.* at 21.)

Finally, the court held that the Multidistrict Panel's actions were fully consistent with the Panel's obligation to remand cases to the transferor court "'at or before the conclusion of pretrial proceedings.'" *Id.* at 22 (quoting § 1407(a)). The court ruled that, "[u]nlike a [transferee court's self-transfer of an MDL case], which makes it impossible for the Panel to remand even though the action has not been terminated, settlement negotiations will either be successful, in which case the action will terminate, or they will eventually conclude and the action can be remanded at that point." Pet. App. 22.[7]

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[7] The court also rejected Petitioners' argument that settlement opportunities had in fact ended, noting that the docket sheets for Petitioners' cases "show a pattern of settlements continuing through 1999"—after the Multidistrict Panel denied remand—and noting that Petitioners had never presented to Judge Weiner or the Multidistrict Panel their argument that the "remaining defendants have stated conclusively that

REASONS FOR DENYING THE WRIT

The Third Circuit rightly denied Petitioners' belated petition for mandamus, and further review by this Court is unwarranted. The decision below correctly construes § 1407 and expressly follows, rather than conflicts with, this Court's holding in *Lexecon*.

Lexecon held that a transferee court may not transfer to itself cases for trial because that would "conclusively thwart" the Panel's obligation to remand cases when pretrial proceedings have concluded. Here, however, the transferee court has not transferred to itself these or any other cases for trial. Nor has the Third Circuit thwarted the Multidistrict Panel's obligation to remand cases when pretrial proceedings have concluded. To the contrary, it specifically noted that Petitioners' cases must be remanded when all avenues for settlement have been exhausted and pretrial proceedings have therefore concluded. Moreover, relying on this Court's reasoning in *Lexecon*, the Third Circuit held that cases in an MDL proceeding are "coordinated" under § 1407 even when the transferee court is not conducting discovery applicable to all cases, so long as the cases share a common core and issues overlap. In short, the Third Circuit's interpretation of § 1407 directly tracks this Court's analysis in *Lexecon*.

Finally, although the Petition purports to raise a dispute about whether cases are "coordinated" under § 1407 when they are subject to very successful settlement procedures before a district court judge who is intimately familiar with all facets of the asbestos litigation, the *real* dispute is a factual one, namely, whether the transferee court was wrong in concluding that settlement possibilities in these cases continued to exist. Both the Multidistrict Panel and the Third Circuit declined to upset that conclusion, which warrants no further review by this Court.

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they will not settle until the cases are set for trial." Pet. App. 13-14 n.4.

A. The Decision Below Correctly Applied § 1407.

Section 1407 places two limitations on the proceedings a transferee court may conduct: such proceedings "must be (1) coordinated or consolidated and (2) pretrial." Pet. App. 13. Petitioners acknowledge that the term "pretrial" "encompasses more than merely discovery." Pet. at 19 n.3. But, in Petitioners' view, a particular case is only "coordinated or consolidated" with other cases in an MDL proceeding if pretrial proceedings are common to all transferred cases. See *id.* Thus, in Petitioners' view, since the transferee court is conducting settlement negotiations that apply to groups of cases, but not all cases in MDL No. 875, coordinated and consolidated proceedings have ended and their cases should be remanded. See Pet. at 15-16.

Relying on this Court's interpretation and the legislative history of § 1407, the Third Circuit correctly rejected that view. In *Lexecon*, the Court held that a particular transferred case is "coordinated" with other cases in an MDL proceeding if the cases share a common core and are "brought before judges in a district where much of the evidence [is] found and overlapping issues [are] considered." 523 U.S. at 34. As the Third Circuit noted, *Lexecon* interpreted "coordinated" to mean that a single case could be coordinated for pretrial purposes with other cases previously transferred in the MDL proceeding even though, in *Lexecon*, "the case was being heard by a different judge" than the one who had heard cases previously transferred and "all of the proceedings with which the individual action was 'coordinated' had already concluded." Pet. App. 16-17.

On the basis of that analysis, the Third Circuit held that, "[t]o be coordinated, it is not necessary that common issues are being contemporaneously addressed." Pet. App. 17. It noted that Administrative Order No. 3 established procedures for all plaintiffs in MDL No. 875 "regarding the mandatory exchange of information, the negotiation process, and the prioritizing of cases." *Id.* It then held that, "applying the reasoning of *Lexecon*, it appears that the individual settlement negotiations and conferences that are

occurring in plaintiffs' cases are in fact 'coordinated' proceedings." *Id.*[8] That reasoning is in perfect accord with this Court's interpretation of § 1407's requirement that pretrial proceedings be coordinated.[9]

As the Third Circuit also noted, the legislative history of § 1407 supports a broad interpretation of "pretrial proceedings" to include settlement efforts: hearings before the House Judiciary Committee show that Congress intended for transferee courts to have all the pretrial powers possessed by district court judges, including the power to facilitate settlement. Pet. App. 18-19. The Petition raises no issue on this score.

For these reasons, the Third Circuit correctly concluded that settlement efforts being conducted by Judge Weiner in MDL No. 875 are appropriate "coordinated" "pretrial proceedings" under § 1407.

B. The Decision Below Does Not Conflict With *Lexecon*.

Petitioners assert that the Third Circuit's decision conflicts with *Lexecon* by adopting a position *Lexecon* supposedly rejected, and by requiring remand of a particular case only when pretrial proceedings in every case in the multidistrict proceeding had

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[8] The court of appeals also determined that cases in MDL No. 875 were in fact coordinated because Judge Weiner has been conducting discovery on litigation screenings and that such discovery "overlaps many of the cases in MDL-875" even if it does not particularly apply to Petitioners' cases. Pet. App. 17.

[9] Petitioners assert that Administrative Order No. 3 does not make the cases "coordinated" because that would make any two cases in a district court "coordinated" by virtue of being subject to the court's local rules. Pet. at 8. Unlike two unrelated cases randomly filed in the same district court, however, cases in MDL No. 875 all involve asbestos litigation and are subject to particular discovery, case-priority, and settlement procedures before a single judge with extensive experience with plaintiffs' counsel, the defendants and their counsel, and this very specialized litigation.

completed. Pet. at 17-19. Those assertions mischaracterize both courts' opinions.

In *Lexecon* the question was whether a transferee court could transfer to itself for trial a case transferred to it for pretrial proceedings. The Court concluded that the language in § 1407(a)—"[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings"—was "impervious to judicial discretion" and thus barred self-transfers. 523 U.S. at 35. Before reaching that conclusion, however, the Court considered whether transferee courts had self-transfer powers under their authority to conduct "coordinated or consolidated" proceedings. *Id.* at 33-34. Since the case at hand involved only one case in the MDL proceeding, the Court was skeptical of an argument that one such case could be "consolidated" with other cases. *Id.* at 34. But, as noted above, it nonetheless interpreted the term "coordinated" broadly, finding that

> proceedings to resolve pretrial matters were "coordinated" with the conduct of earlier cases sharing the common core of the Lincoln Savings debacle, if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered. (*Id.*)

Although the Court held that its broad interpretation of the term "coordinated" was not enough to overcome the explicit ban on self-transfers, it did not do so by repudiating its broad interpretation of "coordinated," but rather because of the "plain command" of the statute banning self-transfers. See *id.* at 35. Thus the Third Circuit's broad interpretation of the term "coordinated" in this case is in accord, not in conflict, with *Lexecon*.

Nor does the Third Circuit's opinion thwart the Multidistrict Panel's remand obligation by requiring remand of particular cases only when all the cases in an MDL proceeding have been

completed for pretrial purposes. Pet. at 18.[10] On the contrary, the Third Circuit recognizes that these particular cases should be remanded when settlement prospects no longer exist:

> [C]onducting individual settlement conferences does not "conclusively thwart" the Panel's ability to remand * * * [because] settlement negotiations will either be successful, in which case the action will terminate, or they will eventually conclude and the action can be remanded at that point. (Pet. App. 22.)

In short, the Third Circuit did not thwart the Panel's remand obligation, and is not in conflict with *Lexecon*.

C. The Real Issue Here Is Factual.

Petitioners' real complaint is with the conclusion shared by the three courts below that further settlement efforts were not fruitless. The transferee court declined to issue a suggestion of remand and continued to hold settlement conferences in Petitioners' cases–with successful results. See pp. 4-5, *supra*. The Multidistrict Panel noted the ongoing settlement conferences and declined to remand on the ground that the transferee court had an unmatched understanding of the cases and their potential for settlement. The Third Circuit noted that "individual settlement negotiations and discovery continue in MDL 875 and the docket sheets show a pattern of settlements continuing through 1999." Pet. App. 13.

In short, three courts effectively found that Petitioners had not demonstrated that settlement opportunities had truly ended and that their cases were fit for remand. Those factual conclusions, which were clearly correct on the record before the lower courts, do not warrant further review here.

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[10] Petitioners do not identify where in its opinion the Third Circuit supposedly so ruled.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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